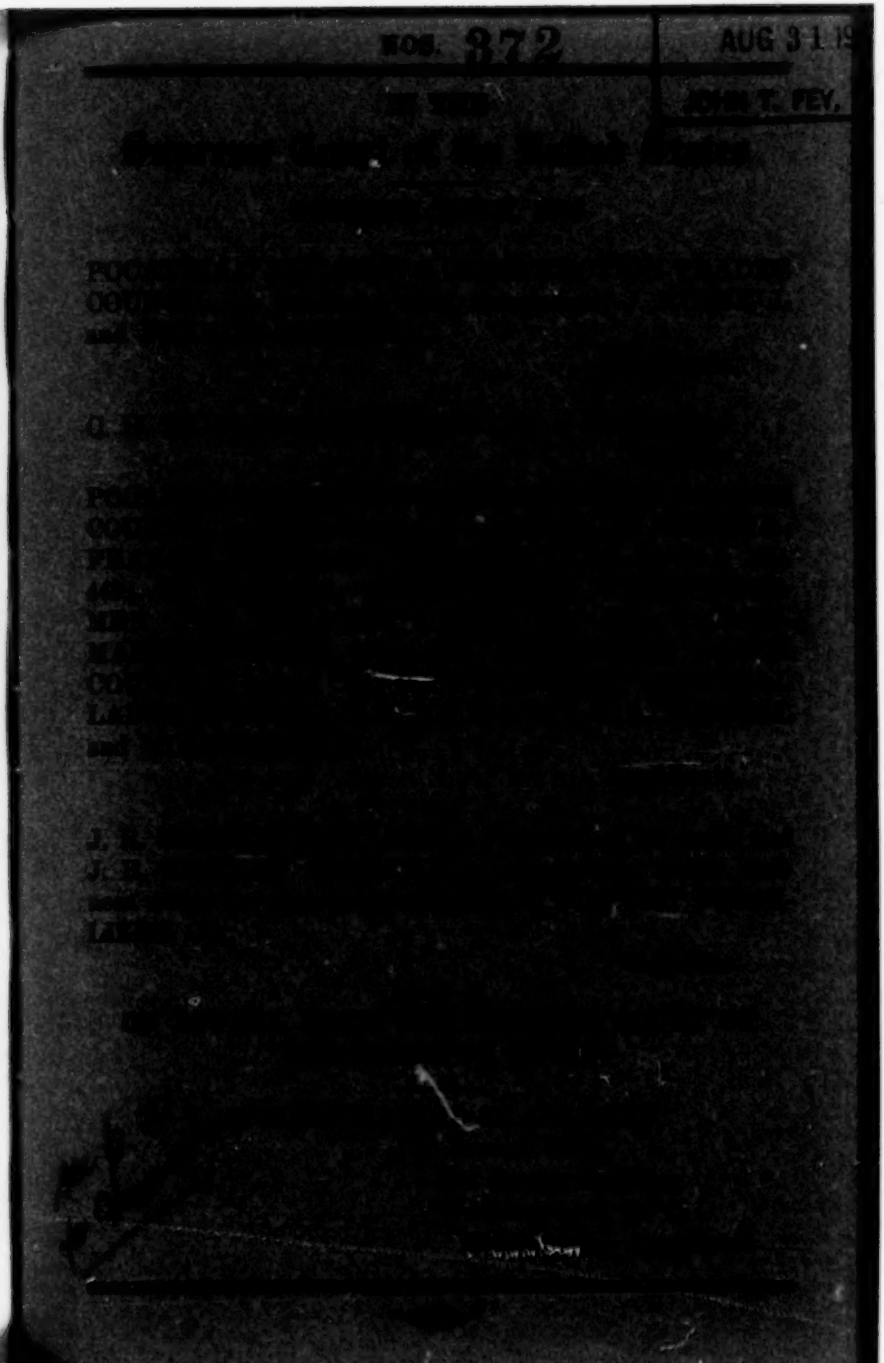
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NOS.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL and FRANCIS SHERMAN,

Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,

Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL; FRANCIS SHERMAN; ELECTRICIANS LOCAL NO. 449; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 983; BOILERMAKERS UNION NO. 182; POCATELLO LABOR COUNCIL, known as the POCATELLO CENTRAL LABOR COUNCIL; CLARENCE LOTT; J. A. RUSSELL and MIKE MORELLI,

Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT

Appellants appeal from the orders of the Supreme Court of Idaho entered on June 4, 1956, denying appellants' petitions for rehearing (R. 44)[1]; and from the judgments of the

[1] The transcript of record has two separate sets of page numbers. References in this Jurisdictional Statement are to the page numbers stamped in blue.

Supreme Court of Idaho entered on April 19, 1956, reversing the judgments of the District Court of the Fifth Judicial District, Power County, Idaho, and remanding with instructions to make permanent the temporary injunctions theretofore issued (R. 38, 39). Appelants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the Supreme Court of Idaho, 297 Pac. 2d 519, 38 LRRM 2086, is not yet officially reported. It is set forth in the transcript (R. 24-32), and a copy is attached hereto as Appendix A, *infra*, pp. 22-31. The opinion of the District Court is not reported or set forth in the transcript. A copy is attached hereto as Appendix B, *infra*, pp. 32-47.

Jurisdiction

These actions were brought by the appellees to enjoin peaceful picketing and other activities engaged in by appellants. The conduct complained of was held by the Idaho Supreme Court to be illegal under Sections 44-801 and 44-712 Idaho Code, and it directed the trial court to make the temporary injunction issued in each case permanent (R. 32, 38, 39).

The judgments of the Supreme Court of Idaho were entered on April 19, 1956 (R. 38, 39); its orders denying appellants' petitions for rehearing were entered on June 4, 1956 (R. 44); and Notice of Appeal was filed in the Supreme Court of Idaho on July 9, 1956 (R. 45).

The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, U.S.C. Section 1257(2). The following cases are believed to sustain the jurisdiction of the Supreme Court to review the judgment in this case by appeal: *United Automobile, Etc., Workers* v. *Wisconsin E. R. B.*, 351 U.S. 266, 76 Sup. Ct. 794; *United Automobile, Etc., Workers* v. *O'Brien*, 339 U.S. 454, 70

Sup. Ct. 781; *LaCrosse Telephone Corp.* v. *Wisconsin E. R. B.*, 336 U.S. 18, 69 Sup. Ct. 379; *Bethlehem Steel Co.* v. *New York S. L. R. B.*, 330 U.S. 767, 67 Sup. Ct. 1026; *Thomas* v. *Collins*, 323 U.S. 516, 65 Sup. Ct. 315.

Statutes Involved

The state statutes whose validity is involved in this case are:

Section 44-801, Idaho Code:

> "It shall be unlawful to cause or threaten to cause, and/or combine or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands."

Section 44-712, Idaho Code:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

In addition, this case involves numerous sections of the National Labor Relations Act, as amended, 61 Stat. 136 ff, 29 U.S.C. §151 ff. The texts of these provisions are set forth in Appendix C, *infra*, pp. 48-51.

Questions Presented

1. Whether the National Labor Relations Act precludes a state court, acting under authority of a state statute prohibiting secondary boycotts, from enjoining unions and union officials from engaging in peaceful picketing and other concerted activities which are fully regulated by the Na-

tional Labor Relations Act and which come within the jurisdiction exercised by the National Labor Relations Board under that Act.

2. Whether Sections 44-801 and 44-712, Idaho Code, as applied in this case, are unconstitutional as in conflict with the National Labor Relations Act or as invading the field which Congress has occupied by the enactment of that statute.

Statement

The Parties: Defendants-Appellants—Pocatello Building and Construction Trades Council is an association of AFL-affiliated local unions in the building and construction industry in and around Pocatello, Idaho.[2] Pocatello Central Labor Council is a similar but broader association, open to all AFL-affiliated local unions in the area. The other appellants are local unions of the Electricians, of the Teamsters, and of the Boilermakers, all affiliated with the AFL; and individual officers of various of the organizations. The appellant labor organizations are sometimes hereafter collectively referred to as the AFL unions.

Plaintiffs-Appellees—Appellee J. R. Simplot Company (hereafter called "Simplot") is an Idaho corporation. It manufactures fertilizer at its plant at Don, Idaho,[3] and operates mines in Idaho, Oregon, and Nevada. The District Court found that Simplot "is engaged in interstate commerce between the respective States of the United States" (R. 441). Appellee C. H. Elle Construction Company (hereafter called "Elle") is an Idaho corporation engaged in local construction work (R. 443, 482).

The Labor Board Proceedings—Prior to 1952, Local No. 983 of the Teamsters, one of the appellants, was the collec-

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[2] The AFL and the CIO have merged since this case arose to form the AFL-CIO.

[3] The Don plant is operated under the trade name of Simplot Fertilizer Company (R. 234-235, 395, 401-402).

tive bargaining representative for the employees at Simplot's Don, Idaho, fertilizer plant (R. 404, 429, 434). In that year, however, the International Association of Machinists, AFL, and the Oil Workers International Union, CIO, petitioned for an election. After hearing, the Board, on July 15, 1952, issued its Decision and Direction of Election (R. 5-6). The decision recites that Simplot "is engaged in commerce within the meaning of the National Labor Relations Act",[4] and that the following employees constitute an appropriate unit:

> "All production and maintenance employees at the Employer's Dom [sic], Idaho, plant, including the maintenance electrician, but excluding office clerical employees, laboratory chemists, and supervisors as defined in the Act."

In the election a majority of the employees in the unit voted for the Oil Workers International Union, CIO, and a certification in favor of that union was issued by the Board on August 7, 1952 (R. 421-422, 404-405, 442).

Following the certification, Simplot and the Oil Workers, CIO, entered into collective bargaining (R. 264-265, 271-272). However, due to the absence from the area of the Oil Workers' staff man, no agreement had been completed up to the time of the hearing (October 1952) in this case (R. 322-323).

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[4] The transcript of the Board proceedings, which is not included in this record, reads, p. 11:

"Howard E. Hilbun (Hearing Officer): * * *.

"Simplot Fertilizer Company operates a plant at Don where phosphate rock is converted into fertilizer products. During the past year Simplot Fertilizer Company made sales of fertilizer products at this plant valued in excess of one million dollars. Approximately fifty percent of these sales were shipped or sold to out-of-state points.

"The Company stipulates to these facts but makes no stipulation regarding coverage under the National Labor Relations Act. Is that your stipulation, Judge Baum?"

"Judge Baum: 'That is correct'."

Conversion of the Simplot Plant—Meanwhile, in the summer of 1952, Simplot undertook to convert its fertilizer plant from the production of single phosphate to triple super phosphate. This involved a "major conversion and reconstruction" of the plant, including the installation of new stainless steel tanks, conveyors, etc., and required raising the building roof in one place (R. 442, 242-243).

For various reasons Simplot decided to fabricate the steel tanks and certain other equipment in its own shop at the fertilizer plant, instead of purchasing them from outside suppliers (R. 243-247). Sometime in June Simplot entered into a verbal cost plus fixed fee contract with Elle, under which Elle undertook to do the forming work, machinery erection, and installation incident to the plant conversion (R. 443, 457, 480-481). This contract was confirmed by letter of July 1, 1952 (R. 3-4, 443).

Elle's Contract with the AFL Unions—Through the Southeast Idaho Contractors Association of which it was a member, Elle was a party to an agreement, dated April 1, 1951, with appellant Pocatello Building and Construction Trades Council and the local unions affiliated therewith (R. 398, 443, 457, 480). This contract provided (R. 399):

> "2. *Scope of Agreement.*
>
> "This agreement shall apply to all work within the jurisdiction of the Pocatello Building and Construction Trades Council and affiliated Local Unions of the Building and Construction Trades Department of the American Federation of Labor, to be performed by Contractors on all additions, extensions, changes, and extra work orders in connection therewith. Jurisdiction is such as is defined by the Building and Construction Trades Department and by the International organization of each of the affiliated Local Unions."

The contract contained a union shop agreement of the familiar type permitted by the Taft-Hartley Act (R. 399).

The Dispute—During September 1952, difficulties arose between Simplot and the appellant AFL unions which rep-

resented Elle's employees. Appellant Sherman, who is Secretary of the Building and Construction Trades Council, noted on visits to the plant that Simplot employees, rather than Elle employees, were assembling conveyor supports, fabricating steel tanks, and removing the building roof (R. 71, 345, 443-444). Sherman repeatedly protested to Hanson, Simplot's plant manager, against Simplot's employees doing this "construction work," and asserted that the Elle employees would do all of the construction work or none of it (R. 344-345, 444-446). Hanson replied that Simplot's employees were represented by the CIO (i.e., the Oil Workers Union) and that it had no objections (R. 345-346). Several arguments of this sort, which seem to have revolved around the scope of the Oil Workers' certification, took place between Sherman and Hanson during September (R. 343, 346-348, 361, 369).

Some time around the end of September, 1952, Elle sent a crane, with a crew of two men (Elle employees) to the Simplot plant to erect a rotary drum. The job required more men, and two or three Simplot employees were assigned to work with the Elle crew (R. 247-248, 255, 292-293). This episode apparently brought the dispute to a head.

On October 1, 1952, Hanson, Simplot's attorney, and appellant Lott, who is Secretary of the appellant Teamsters' Local, were meeting on another matter with Howard Hilbun, a field representative of the NLRB (R. 352).[5] Hanson was called to the phone and advised that Sherman was making "demands" (R. 352). The matter was discussed informally with Hilbun, who said that the AFL unions were probably right in their contention that the Oil Workers' certification did not cover construction (R. 188, 197-198, 363-365), and suggested that the parties get together and work out the matter (R. 352-353).

As a result of that suggestion representatives of the

[5] Hilbun had served as the hearing officer in the representation proceeding which resulted in the certification of the Oil Workers.

appellant AFL unions, of Simplot, and of Elle met the next day, October 2, in an effort to adjust their differences (R. 353-354, 444). They did not succeed.

Appellants took the position at the outset that their members would do all of the construction work or none of it (R. 74-75). Put another way, they "asked that the Pocatello Building and Construction Trades Council have the jurisdiction of the construction work on that job" (R. 122; R. 126). After caucusing, the companies proposed that Simplot's employees do the fabrication work and Elle's employees the erection work (R. 444, 75, 76, 96-97, 147, 355-356). In other words, Simplot offered to discontinue having its employees work on erection in the same crew with Elle employees, as had sometimes happened, and to confine its employees to doing fabrication work (R. 174, 182-183, 210, 211). Simplot was, however, adamant in its insistence that its employees do the fabrication work (R. 444, 75, 76, 147, 221).

This proposition was turned down by the appellant AFL unions, which insisted that their members must do both the fabrication and the erection work, or they would refuse to do any of it (R. 76-77, 97, 123, 251). The AFL unions said that fabrication was as much a part of construction as erection, and that if they permitted plant maintenance workers to do construction "eventually all the construction work would be done by plant maintenance forces, because they would do it at a cheaper rate" (R. 98-99). Appellants were fearful that the employment conditions of the building trades craftsmen would be undermined (R. 157).

Considerable argument took place as to whether the NLRB certification of the CIO Oil Workers covered construction work, with the AFL unions taking the position that it did not and the companies the position that it did (R. 84-85, 90-91, 99, 163, 192-194).

According to company witnesses, the AFL union representatives offered to permit the Simplot employees to do construction work if those employees were paid at the

wage rates for the construction trades and if they secured permits from the AFL unions, for which they were to pay $2.00 a week per man (R. 250, 320, 330-331, 355). This testimony as to permits was denied by the union witnesses, who said that their offer was to admit qualified Simplot employees to membership in the AFL unions, and have them work under the construction wage scales (R. 81, 91-94, 128, 157-158, 176-177). One union representative testified that he advised the companies that "it was illegal to charge a man a permit to work without [his] being a member of the Union" (R. 176). This testimony was accepted by the District Court (*infra*, p. 37).

In any event, the meeting ended with the AFL unions adhering to their position that their members would do all of the construction work (fabrication and erection) or none (R. 444, 481).

The dispute not having been resolved, on October 13 or 14, 1952, the appellant Building and Construction Trades Council placed one (1) picket at the entrance to the Simplot fertilizer plant (R. 444, 78, 114-115, 279, 292, 357). The picket carried a sign which read (R. 444, 481):

> "Simplot Fertilizer Company Unfair to Organized Labor Pocatello Building and Construction Trades Council, A. F. of L."

The District Court found "that the picketing and advertising on the part of the defendants was peaceful and tranquil, and without threats, violence or intimidation" (R. 481, 446). The Simplot employees, except perhaps for two or three who belonged to AFL unions (R. 185) did not honor the picket line and reported for work (R. 445, 79, 113, 357). The Elle employees, however, respected the picket line (R. 482, 445, 279). Members of the appellant Teamsters Local employed by various trucking concerns also refused to cross the picket line, in consequence of which some trucking companies failed to make deliveries or pick-ups from the fertilizer plant (R. 445, 357-358). In

addition the employees of at least one local contractor refused to do work at the Simplot fertilizer plant because of the picket line (R. 115).

The Building and Construction Trades Council also placed Simplot on its "unfair list" and notified various local businesses, either by mail or by phone, that it had done so (R. 1, 104-107, 135). In addition, two or three employees of Elle who were working on a construction job at Simplot's phosphate mine at Gay, Idaho, refused to work when they learned that Simplot's fertilizer plant was being picketed, and that Simplot had been placed on the Council's unfair list (R. 445-446, 101, 231-232).[6]

The State Court Proceedings: How the Federal Question Is Presented—Elle and Simplot promptly filed suit in a state District Court (R. 401-406, 456-462). The complaints alleged in general the facts heretofore enumerated. Sim-

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[6] In a 1952 decision in a representation proceeding involving this mine, the Board stated: "During 1951, the Employer sold fertilizer products, manufactured at its Pocatello [i.e., Don] plant from the phosphate rock produced at its mine, valued at more than $1,000,000, approximately 50 percent of which was shipped directly to points outside the State of Idaho.

"The Employer contends that as only its mining operations are involved in the instant proceeding and as none of the products produced at its mine is shipped directly to points outside the State of Idaho, the Board does not have jurisdiction herein. We find no merit in this contention. The record reveals that the Employer's mine and fertilizer plant are under common supervision and managerial control. * * * Moreover, as pointed out above, the Employer's mine is operated primarily for the purpose of supplying its fertilizer plant with phosphate rock and its mining operations actually represent the initial step in the manufacture of fertilizer products. Accordingly, we find, on the basis of these facts, that the Employer's mining operations constitute an integral part of its fertilizer manufacturing operations. As the Employer, during 1951, shipped fertilizer products valued at over $500,000 directly outside the State of Idaho, we find, contrary to the Employer's contention, that it is engaged in commerce within the meaning of the Act." *J. R. Simplot Company d/b/a Simplot Fertilizer Company*, 100 NLRB 771, 772-3 (decided August 26, 1952).

plot's complaint set forth, *inter alia*, the certification of the Oil Workers by the NLRB (R. 404-405). It alleged that the defendants sought to compel it (R. 411):

> "to permit said work within said plant to be performed by the members of the said various crafts who are named as defendants herein * * *."

Simplot further alleged that the defendants' demands "are ones that cannot and will not be enforced by the National Labor Relations Board" (R. 414). Simplot alleged that the conduct complained of "is contrary to the Statutes of the State of Idaho" (R. 414, 411), while Elle alleged that defendants' acts (R. 460):

> "constitute a secondary boycott are illegal and unlawful under the statutes of the State of Idaho and particularly under Section 44-801 of the Idaho Code."

An order to show cause was issued in each case (R. 418, 465), and the cases were consolidated for hearing on the order (R. 56).

Counsel for the defendants-appellants then orally challenged the jurisdiction of the court (R. 63-66). The argument is not recorded in the transcript, but the following colloquy appears (R. 67):

> "MR. BECK: Your Honor, if the record is clear that we raised a Federal question now, we have no other purpose.
>
> "THE COURT: Yes, as to the jurisdiction of the court.
>
> "MR. BECK: As to the jurisdiction.
>
> "THE COURT: Very well, I think the record may so show. * * *."

The trial court ruled that it would tentatively assume jurisdiction, but without barring further presentation of the issue (R. 66-67).

The defendants'-appellants' case was put in first, and following its conclusion appellants renewed their challenge of the court's jurisdiction (R. 227). They urged that the court did not have jurisdiction because (R. 227):

> "the plaintiffs have not sought or adopted the administrative remedy of the National Labor Relations Board

> procedure under and by virtue of the National Labor Relations Act as amended in Nineteen forty-seven."

and because

> "the Federal government of the United States of America, by virtue of Congressional enactment has preempted the factual situations as alleged in the plaintiff's complaints, and both of them."

The court again overruled the objection to its jurisdiction (R. 228).

At the conclusion of the hearing the appellants once more renewed their contention that the court had no jurisdiction because the Federal Government had preempted the field (R. 390-391). The court, though expressing some doubt about its jurisdiction, then issued temporary injunctions (R. 442). The injunctions, issued on October 25, 1952, prohibited the defendants-appellants, *inter alia,* from picketing the Simplot fertilizer plant; from requesting AFL union members not to cross the picket line; from notifying business houses not to deliver merchandise to or receive it from Simplot; from sending out communications that a picket line had been established at the Simplot fertilizer plant; from labeling Simplot as "unfair"; and from advising Elle employees not to work at the Simplot fertilizer plant or mine (R. 425-427, 467-468).

Thereafter, on February 4, 1953, appellants filed their answers to the complaints (R. 428-433, 469-471). The answer in the Simplot case alleged that Simplot was engaged in interstate commerce, and that the acts complained of by Simplot (R. 431, 432):

> "are for the most part grievances, matters and subject matter exclusively within the jurisdiction of the National Labor Relations Board for determination; that the patrolling and picketing complained of by plaintiff * * * is a fitting and lawful exercise of free speech and protected by the Constitution of the State of Idaho, and of the United States; that there is no valid code, statute, law or ordinance of the State of Idaho prohibiting the exercise of such free speech."

This language is repeated in the answer in the Elle case (R. 470).

By stipulations between the parties the cases were submitted to the District Court for final ruling upon the record made on the applications for temporary injunctions (R. 449, 472).

Thereafter, on November 16, 1953, the District Court handed down its Memorandum Opinion.[7] It rejected the contention that the Labor Management Relations Act, 1947, preempted the field, on the ground that Elle's operations did not affect interstate commerce, and that the National Labor Relations Board therefore did not have jurisdiction.[8] The Court did not, in this connection, advert to the admitted facts, recited elsewhere in its opinion and subsequently in its findings (*infra*, pp. 34, 38; R. 441-442, 445, 481-482), that the defendants' activities were directed primarily against and affected Simplot, which was engaged in interstate commerce and over which the federal Board had asserted jurisdiction.

However, the District Court went on to conclude that the defendants' activities were legitimate and permissible. It said (*infra*, p. 43):

> "I am of the opinion that defendants' objective in instituting the picket line, putting up placards, and advertising that they considered Simplot unfair to organized labor was a legitimate one protected by the constitutions of both the Federal and State Government as long as orderly and peaceably conducted and placards and advertising remained truthful."

The Court further stated that if the Idaho secondary boycott statute (Section 44-801, Idaho Code) were interpreted as

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[7] Annexed hereto as Appendix B, *infra*, pp. 32-47.

[8] The court relied on the district court decision in *Sperry* v. *Denver Building and Construction Trades Council*, 77 F. Sup. 321, without noting that this Court reached the opposite conclusion in the same case, *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 71 S. Ct. 943 (1951).

prohibiting the defendants' conduct it would be unconstitutional.

Subsequently, on March 1, 1954, the District Court dissolved the temporary injunctions and entered judgment in favor of the defendants in both cases (R. 448, 484). At the same time the Court filed Findings of Facts and Conclusions of Law in line with its opinion (R. 441-448, 480-483).[9]

The Supreme Court of Idaho reversed. It held that the jurisdiction of the Idaho courts over the dispute was not supplanted by the National Labor Relations Act (R. 29; *infra*, pp. 27-28)[10]; and that the activities of the appellants were illegal.

The court stated that "it is the contention" of the appellant AFL unions "that in the reconstruction work being done at the Don plant, the craftsmen who are members of the A.F.L. should perform all such reconstruction work or none"; and that the purpose of the picket line and the other activities engaged in by appellants "was to compel Simplot

[9] In the Simplot case the court found that Simplot "is engaged in interstate commerce" (R. 441), and that the National Labor Relations Board had certified the Oil Workers for a production and maintenance unit at Simplot (R. 442). In its Conclusions of Law, however, the court stated (R. 447): "3. That the power and the authority of this Court to hear and determine this cause is not preempted or supplanted by the provisions of the Labor Management Relations Act of 1947, 29 U.S.C. 151, et seq." In the Elle case, the Court found that Elle was not engaged in interstate commerce within the meaning of the National Labor Relations Act (R. 482).

[10] The court's opinion is rather cryptic on this point. It cites *Carpenters & Jointers* v. *Ritters Cafe*, 315 U.S. 722, 62 S. Ct. 807 and *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 74 S. Ct. 833 and various equally irrelevant decisions of its own and of other state courts. It does not discuss the recent decisions of this Court urged on it by counsel for appellants as controlling, viz., *International Union* v. *O'Brien*, 339 U.S. 454, 70 S. Ct. 781; *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 74 S. Ct. 161; *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933, 74 S. Ct. 373; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 75 S. Ct. 480.

to employ AFL craftsmen or labor in the construction work and pay a higher wage than Simplot was allegedly paying" (R. 27; *infra*, pp. 25-26).[11] The court pointed out that the Oil Workers Union, CIO, had been certified by the National Labor Relations Board as the collective bargaining representative of the Simplot employees (R. 26; *infra*, pp. 24-25); and it referred to and by implication rejected the appellants contention that the Oil Workers' certification did not extend to construction work (R. 28-29; *infra*, p. 26). The court said that the question of what work was to be performed by Elle and what by Simplot was a matter for agreement between the two companies, and not a proper concern of appellants; and that the contention that Simplot's employees were paid less than the AFL scale was properly the concern only of Simplot's employees and their collective bargaining representative—i.e., the Oil Workers Union—and not of the appellants (R. 28-29; *infra*, p. 27).

The Court held that the activities engaged in by the appellants "constitute a secondary boycott prohibited by Section 44-801, Idaho Code", and that they were not constitutionally protected as freedom of speech by the United States or Idaho Constitutions (R. 31-32; *infra*, pp. 30-31).

The Court reversed the judgments and remanded with instructions to the trial court to make the temporary injunction issued in each case permanent (R. 38, 39).

Appellants' petitions for rehearing were denied without opinion on June 4, 1956 (R. 44).

Notice of Appeal was filed in the Supreme Court of Idaho on July 9, 1956 (R. 45).

The Federal Questions Are Substantial

1. It is clear that, as regards their effect upon interstate

[11] The opinion of the Supreme Court also states that the appellants offered to permit the Simplot employees to do construction work if they were paid construction wages and if the AFL unions were paid $2.00 per man per week (R. 28; *infra*, p. 26). The trial court's opinion states the contrary (see *infra*, p. 37).

commerce, these cases are within the jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act. It is also clear that the Board would exercise its jurisdiction.[12]

In the summer of 1952, just before these cases arose, the federal Board did assert jurisdiction in a representation proceeding at the Simplot fertilizer plant principally involved here, and also in a separate representation proceeding at the Simplot mine, also involved here to a lesser extent (R. 421-422; *J. R. Simplot Company d/b/a Simplot Fertilizer Company*, 100 NLRB 771). Indeed it was the Board's certification of the Oil Workers as bargaining representative at the fertilizer plant which precipitated the controversy between appellants and appellees, and the scope of the Board's certification has been an issue both in that controversy and in the resulting state court litigation.

Subsequent to its assertion of jurisdiction in the Simplot cases, the Board did, in the summer of 1954, announce new standards to govern its exercise of jurisdiction. Even under these more stringent standards, however, the Board would take jurisdiction in these cases. For under the current standards the Board will assert jurisdiction over

> "An enterprise which produces or handles goods and ships such goods out of State * * * valued at $50,000 or more." *Nineteenth Annual Report of the National Labor Relations Board* (1954), p. 2.

And in both of the 1952 Board proceedings involving Simplot, it was stimplated that during 1951 Simplot sold fertilizer products, manufactured at its Don fertilizer plant from the phosphate rock produced at its mine, valued at more than

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[12] Hence the question whether the States may assume jurisdiction over cases which are within the statutory jurisdiction of the federal Board, but which it declines in its discretion to handle, is not presented. That issue is now before the Court in *Amalgamated Meat Cutters* v. *Fairlawn Meats*, No. 41, October Term 1956, and in *San Diego Building Trades Council* v. *Garmon*, No. 50, October Term 1956.

$1,000,000, approximately 50 percent of which was shipped directly to points outside the State of Idaho (see *supra*, p. 5, footnote 4; p. 10, footnote 6). The District Court's finding that Elle's operations do not affect commerce within the meaning of the National Labor Relations Act (R. 482) is immaterial even as to Elle, since in secondary boycott situations the Board takes into account for jurisdictional purposes the operations of all the affected employers. *International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc.*, 110 NLRB 1769 (1954); *Local Union No. 830, Brewery and Beer Distributors Drivers, Helpers, and Platform Men, etc. (Earl Vann)*, 106 NLRB 405 (1953); *Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Jamestown Builders Exchange, Inc.)*, 93 NLRB 386 (1951).

2. It is equally clear that the particular types of union activities involved in these cases fall squarely within the field occupied by the National Labor Relations Act. We do not, of course, concede that appellant's activities constituted unfair labor practices under that Act.[13] As this Court said in a similar case, *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478, 75 Sup. Ct. 480, 486:

> "The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance."

And as this Court went on to say (358 U.S. 468 at 478-9, 75 Sup. Ct. 480 at 487):

> "If this conduct does not fall within the prohibitions of §8 of the Taft-Hartley Act, it may fall within the protection of §7, as concerted activity for the purpose of mutual aid or protection."

That the legality of the union conduct involved in these

[13] In their briefs in the Idaho Supreme Court both Simplot and Elle argued that appellants' activities violated the National Labor Relations Act; and the court in its opinion cites decisions under the federal Act in support of its conclusion that appellants engaged in an illegal secondary boycott (*infra*, p. 30; R. 31).

cases is fully regulated by the federal Act is easily demonstrated.

(1) *Jurisdictional Strike*—Section 8(b) (4) (D) of the National Labor Relations Act makes it an unfair labor practice for a union or its agents to induce employees to engage in concerted action (i.e., a strike or refusal to transport or handle goods or materials) for the purpose of requiring any employer to assign particular work to employees in a particular union or in a particular trade or craft, rather than to employees in another union, trade or craft.

The courts below found that the appellants induced Elle's employees to strike, and employees of trucking concerns to refuse to transport goods, for the purpose of requiring Simplot to assign all the construction work (both fabrication and erection) in connection with the conversion of its plant to members of AFL craft unions, rather than to production and maintenance workers represented by the CIO Oil Workers Union (*infra*, p. 26; R. 27, 444-445, 481). This finding plainly raises an issue of violation of Section 8(b)(4)(D).

(2) *Strike Against A Certification*—Section 8(b)(4)(C) of the Act makes it an unfair labor practice for a union to induce employees to engage in concerted action for the purpose of requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as their representative.

The Idaho Supreme Court found that the appellants induced the employees of Elle and of various trucking concerns to engage in concerted action "to compel Simplot to employ AFL craftsmen or labor in the construction work and pay a higher wage than Simplot was allegedly paying" (*infra*, p. 26; R. 27). The court declared that the appellants had no legitimate concern with Simplot's wage scale; and that only Simplot's employees or their bargaining representative, i.e., the Oil Workers, did have such a concern; and it referred to and at least by implication rejected the appel-

lants' contention that the Oil Workers' certification was limited to "production and maintenance". These findings plainly raise a question of violation of Section 8(b)(4)(C).

Here again we do not, of course, concede that there was such a violation. The Labor Board representative who was informally consulted apparently agreed with the contention of appellants as to the limited scope of the Oil Workers' certification (R. 188, 197-198, 363-365). But certainly this question, involving the interpretation of the National Board's own certification, was peculiarly one for the Board and not for a state court.

(3) *Secondary Economic Pressure for Recognition*—The findings just referred to likewise raise an issue as to violation of Section 8(b)(4)(B) of the federal Act. That section makes it an unfair labor practice for a union to induce the employees of one employer to engage in concerted action for the purpose of requiring any other employer to bargain. As just noted, the court below found that appellants induced the employees of Elle and of trucking concerns to engage in concerted action to compel Simplot to employ AFL craftsmen for construction and to pay them higher wages; and the court plainly regarded this as an attempt by appellants to compel Simplot to bargain with them. A question of a violation of Section 8(b)(4)(B) is thus presented in addition to the possible violation of Section 8(b)(4)(C) just discussed and without regard to the scope of the Oil Workers' certification.

(4) *Secondary Boycott*—Section 8(b)(4)(A) make it an unfair labor practice for a union to induce the employees of any employer to engage in a strike or refusal to transport or handle goods or materials for the purpose of requiring any employer to cease doing business with any other person. Here the appellants admittedly induced the employees of Elle to strike and the employes of various trucking concerns to refuse to transport goods, and it could be contended that appellants' purpose was to induce Elle and the trucking concerns to cease doing business with

Simplot. Thus the courts below found that appellants' activities were directed primarily against Simplot, and not against Elle (*infra*, pp. 26-27, 38, 44; R. 29, 444, 481-482). Here again, a substantial issue of violation of the federal Act is presented. Indeed in the Idaho Supreme Court both Simplot and Elle asserted that the appellants' activities constituted an illegal secondary boycott under the National Labor Relations Act.

As respects the issues which these cases thus present as to possible violations of Sections 8(b)(4)(A) and (B) of the Federal Act, this case substantially resembles *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 75 Sup. Ct. 480.

(5) *Illegal Discrimination*—Section 8(b)(2) of the National Labor Relations Act makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3). The latter section in turn makes it an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization, except under a union shop agreement of the type described in that section with a labor organization which is the collective bargaining representative of the employees.

Here appellants admitted that at the October 2 conference with appellees, they offered to permit Simplot employees to do construction work if they became members of the appropriate AFL unions and were paid the construction wage scales (R. 81, 91-94, 128, 157-158, 176-177). If this be interpreted as meaning that Simplot was to require its employees doing construction work to join the appellant AFL unions, an issue of violation of Section 8(b)(2) is presented. The appellant AFL unions could not enter into a valid union shop agreement with Simplot because they were not the representative of Simplot's employees. Absent such a valid union shop agreement, it would violate Section 8(a)(3) for Simplot to require its employees to join the appellant AFL

unions; and would violate Section 8(b)(2) for appellants to attempt to induce Simplot to impose such a requirement.

As respects this possible violation of Section 8(b)(2) this case resembles *Garner* v. *Teamsters*, 346 U.S. 485, 74 Sup. Ct. 161, and *Building Trades Council* v. *Kinard Construction Company*, 346 U.S. 933, 74 Sup. Ct. 373.

The propositions need not be further labored that the activities of appellants which the Idaho Supreme Court directed be permanently enjoined are fully regulated by the National Labor Relations Act, and fall within the jurisdiction which the National Board asserts under that Act. Indeed in similar cases in which federal preemption was not clearer than here, this Court has reversed state courts *per curiam*. *General Drivers, etc., Union* v. *American Tobacco Co.*, 348 U.S. 978, 75 Sup. Ct. 569; *Building Trades Council* v. *Kinard Construction Company*, 346 U.S. 933, 74 Sup. Ct. 373; *Plankinton Packing Co.* v. *Wisconsin E. R. B.*, 338 U.S. 953, 70 Sup. Ct. 491.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 8174

C. H. ELLE CONSTRUCTION CO., a corporation,
Plaintiff-appellant,

v.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL and FRANCIS SHERMAN, *Defendants-respondents*

No. 8175

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER COMPANY, *Plaintiffs-appellants*

v.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL; FRANCIS SHERMAN; ELECTRICIANS LOCAL No. 449; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION No. 983; BOILERMAKERS UNION No. 182; POCATELLO LABOR COUNCIL, known as the POCATELLO CENTRAL LABOR COUNCIL; CLARENCE LOTT; J. A. RUSSELL and MIKE MORELLI, *Defendants-respondents.*

BOISE MARCH TERM, 1956

(Filed April 19, 1956)
CLAY KOELSCH, *Clerk*

Appeal from the District Court of the Fifth Judicial District, Power County, Idaho. Honorable D. H. Sutphen, Presiding Judge.

Actions for injunctions. From a decree dissolving temporary injunctions issued, plaintiffs appealed. *Reversed* and the causes remanded with instructions.

Louis F. Racine, Jr., Pocatello, attorney for appellant C. H. Elle Construction Co.

O. R. Baum and Ruby Y. Brown, Pocatello, attorneys for appellant J. R. Simplot Company.

George R. Phillips, Pocatello; Clarence M. Beck and Reid W. Nielsen, Salt Lake City, Utah, attorneys for respondents.

Keeton, J.

Appellant J. R. Simplot Company, a corporation, doing business as the Simplot Fertilizer Company, brought an action against the Pocatello Building & Construction Trades Council, an unincorporated association, and others, to secure an injunction to prohibit picketing and other activities engaged in by defendants and respondents. A similar action was brought by C. H. Elle Construction Company against the Pocatello Building & Construction Trades Council, and others, to enjoin the same activities complained of by appellant Simplot. The two cases were consolidated in the District Court and here for decision.

Appellant J. R. Simplot Company and Simplot Fertilizer Company will hereinafter be referred to as Simplot. Appellant C. H. Elle Construction Company will hereinafter be referred to as Elle. Defendants and respondents in both cases will be referred to as the Union.

A show cause order was issued in the Simplot case returnable on October 21, 1952, and the Union was directed to show cause why it should not be enjoined and restrained from performing the acts complained of in the complaint, namely: maintaining a picket line or any picket line at the entrance of the Simplot plant at Don, Idaho; notifying and advising business houses, concerns, and people in general not to have their employees cross a picket line, the picket line, or any picket line. A similar show cause order was issued in the Elle case returnable at the same time, by the terms of which the Union, and persons acting in its behalf, were directed to show cause why they should not be restrained and enjoined from maintaining pickets and picket-

ing in front of or in the immediate vicinity of the Simplot Fertilizer Company in Power County, Idaho, and certain other activities engaged in by the Union.

The Union in each case appeared at the time directed, filed no pleading or showing whatsoever, and entered an objection to the jurisdiction of the court to hear the matter, which objection was overruled. Thereafter testimony was submitted by the Union, Simplot and Elle, and at the conclusion of the evidence, on October 25, 1952, the court in the Simplot case issued a temporary injunction that the Union, its officers, agents, servants and pickets, and persons acting in its behalf be enjoined and restrained from maintaining pickets and picket lines at the plant of Simplot at Don, Idaho, and from picketing said plant, and from advising any members of the individual crafts not to cross the picket line, or any picket line, and enjoined the doing of other acts complained of in the complaint. A similar temporary injunction was issued in the Elle case. Thereafter the Union, in each case, filed an answer to the complaint. The cases were heard on the merits on March 11, 1953, and from the testimony and other evidence, the court thereafter entered findings of fact, conclusions of law and judgments favorable to the Union and dissolved the temporary injunctions formerly issued. Simplot and Elle appealed from the judgments.

Simplot has for a number of years last past been, among other things, engaged in the operation of a phosphate fertilizer plant at Don, Idaho. Certain conversion work was undertaken by Simplot at the plant which included construction of certain stainless steel tanks. In the conversion of the plant certain heavy construction work had to be done. Elle is an independent contractor, equipped with heavy machinery to perform heavy construction work. A contract was entered into between Elle and Simplot in which a part of the reconstruction work and the conversion of the Simplot plant was to be done by Elle.

Simplot's employees are members of the Oil Workers In-

ternational Union, an affiliate of the Congress of Industrial Organization, hereinafter referred to as the CIO, and had been certified by the National Labor Relations Board as the representative for the purpose of collective bargaining with Simplot. Elle's employees are members of certain crafts associated with the American Federation of Labor. None of Simplot's employees was a member of the American Federation of Labor, and none of Elle's employees was a member of the CIO.

The Union, an unincorporated association of craftsmen, which represents the employees of Elle, had a contract with Elle which enumerated the conditions of employment, wage to be paid, and other matters, which, among other things, provided that all employees of Elle should be required to become and remain members of the Union as a condition of employment.

The court found that there was no labor dispute existing between the CIO Oil Workers International Union and Simplot, or its employees, and further found that a dispute (distinguishable from a labor dispute) arose and existed between Simplot and the Union.

During the progress of the reconstruction work, the Union established a picket line at the only entrance to the Simplot plant and there displayed an advertisement reading "Simplot Fertilizer Company Unfair to Organized Labor. Pocatello Building & Construction Trades A. F. of L." Simplot was then placed on the Union's unfair list and members of the Teamsters Union No. 983 and others were notified. Trucks hauling material to and from the Don plant, the workmen being members of the A.F.L., refrained and refused to cross the picket line or make deliveries to or pickups from the Don plant. Simplot's employees ignored the Union's picket or pickets and advertisements, and continued to work as though no picket line had been established.

It is the contention of the Union that in the reconstruction being done at the Don plant, the craftsmen who are members of the A.F.L. should perform all such reconstruction

work or none. The purpose of the picket line and other activities engaged in by the Union directed against Simplot was to compel Simplot to employ A.F.L. craftsmen or labor in the construction work and pay a higher wage than Simplot was allegedly paying.

The work which the Union insisted should be done by A.F.L. labor was principally in the fabrication of the tanks to be installed. Employees of Simplot were specifically trained to do this work and this item was the principal one giving rise to the controversy. At once time a crane used to unload steel by Elle which required five men to man, and Elle not having such employees, some of Simplot's employees assisted.

During negotiations between the parties, a representative of the Union advised Simplot that the Union would permit the Simplot employees to do the work they were doing if they were paid construction wages and a payment made to the Union of $2.00 per man per week. Neither such employees of Simplot nor their bargaining agent made any objection to doing the work, or the wages paid.

By what authority the Union, or its representatives, assumed to speak for Simplot's employees or to direct Simplot as to what work its employees should do or refrain from doing, or what wages should be paid by Simplot, is not explained.

It is the contention of both Elle and Simplot that the work being done by Simplot's employees was not work which Elle should perform by reason of the contract entered into between Elle and Simplot.

The Union contends that the bargaining representative (CIO) of Simplot's employees was limited to "production and maintenance" and that in the construction work being done by Simplot, the employees of Simplot should not have been permitted to do any of the work in the reconstruction of the plant.

Elle was only to do the work in the reconstruction di-

rected by Simplot. Other work was to be performed by Simplot's employees.

The question of what work Elle was to perform and work to be performed by Simplot was a matter to be determined by agreement between Elle and Simplot. Simplot could have contracted with Elle to do all the work, a part, or none. Under the contract of employment entered into between Elle and the Union, all of the employees of Elle would have to be members of the A.F.L., but the Union is not in a position to complain that Simplot had not delegated Elle to do more of the work than the parties contracted for or that Simplot paid wages allegedly less than Elle employees would have been paid for doing similar work.

If Simplot's employees engaged in the fabrication or finishing of the stainless steel tanks were not paid wages conformable to Elle construction workers, this was a matter over which only Simplot's employees, or its bargaining representative, would have a right to complain, and the contention advanced that Simplot's wage scale was lower than the A.F.L. scale does not present a controversy in which the Union would in anywise be involved, or concerning which it had any right to complain.

There was no labor dispute between Elle and its employees and the activities of the Union were not directed against Elle. It was not shown or attempted to be shown that Elle violated any provision of its contract of employment with the Union. Nor is there any showing that Simplot violated any obligation to any of its employees.

The contention of the Union that the court had no jurisdiction of the matter and that all such questions are here in dispute have been preempted, supplanted and covered in the Anti-Injunction Acts, 47 U.S. Stat. at Large 70, 29 U.S.C.A. 101 to 115, and the National Labor Relations Act, 29, U.S.C.A. 151 to 161 inclusive, has been decided by this Court adversely in *State* v. *Casselman*, 69 Idaho 237, 205 P. 2d 1131; *Poffenroth* v. *Culinary Workers Union, Local No. 328*, 71 Idaho 412, 232 P. 2d 968; *Tarr* v. *Amalgamated*

Ass'n, etc., 73 Idaho 223, 250 P. 2d 904. Cases from other jurisdictions holding that state courts have jurisdiction are: *Milwaukee Boston Shoe Co.* v. *American Federation of Hosiery Workers*, 59 N.W. 2d 762; *General Building Contractors Assoc.* v. *Local Unions (Pa.)*, 87 A. 2d 250; *G. H. and E. Freydberg, Inc.* v. *International Ladies Garment Workers*, 128 N.Y.S. 2d 470; *Fashioncraft, Inc.* v. *Halpern et al. (Mass.)*, 48 N.E. 2d 1; *Goodwins, Inc. et al. v. Hagedorn et al.*, 303 N.Y. 300, 101 N.E. 2d 697; *Opera on Tour, Inc.* v. *Weber et al.*, 285 N.Y. 348, 34 N.E. 2d 349; *Roth* v. *Local Union No. 1460 (Ind.)*, 24 N.E. 2d 280; *Ostroff* v. *Laundry & Dye Works (Wash.)*, 225 P. 2d 419; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 86 L. ed. 1143; *United Const. Workers* v. *Laburnam Const. Corp.*, 347 U.S. 656, 98 L. ed. 1025. Many other cases with a similar holding could be cited.

Sec. 44-703 I.C., a part of the Labor Injunction Relief Act (Secs. 44-701 to 44-713 I.C., incl.), is a restriction on the power of the court to issue injunctions in certain cases without following a specified procedure as defined in Sec. 44-705 I.C. These provisions are applicable only in cases where a labor dispute exists as defined by the Act, Sec. 44-712 I.C. Without the restrictions and limitations contained in the Anti-Injunction Act, a District Judge would have general jurisdiction in all such matters and the Anti-Injunction Statute does not deprive the trial court of jurisdiction. We hold in the matter before us that the controversy here existing has not been preempted, supplanted or covered by the Federal statutes above cited, and the district court had jurisdiction.

A labor dispute is defined by Sec. 44-712 I.C. as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

The Union contends that Sec. 44-703 I.C., which reads:

> "No court, nor any judge or judges thereof shall have

> jurisdiction to issue any restraining order or temporary or permanent injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert any of the following acts:
>
> • • • • • • •
>
> (e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, *any dispute*, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof; (Emphasis supplied) * * *,"

covers any dispute between labor and management as distinguished from a labor dispute. All of the Anti-Injunction Statute, Sec. 44-701 to 44-713 I.C., inclusive, covers certain regulations and relationships between labor and management and the dispute referred to Subd. (e) of Sec. 44-703 I.C. means a *labor dispute* as defined in Sec. 44-712 I.C. and not a dispute foreign to that relationship. The dispute, if one exists, between Simplot and the Union is not a labor dispute and the Anti-Injunction Act above referred to does not limit the District Court's jurisdiction in the matter before us.

It is contended by Simplot and Elle that the activities of the Union complained of are prohibited by the Secondary Boycott Act, Secs. 44-801 to 44-803 I.C., inclusive. Sec. 44-801 reads:

> It shall be unlawful to cause or threaten to cause, and/or combine or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands."

The activities complained of, engaged in by the Union, constitute a secondary boycott prohibited by Sec. 44-801 I.C. See *State* v. *Casselman*, 69 Idaho 237, 305 P. 2d 1131; *Newport Industries, Inc.* v. *Lake Charles Metal Trades Council et al* (*La.*), 85 Fed. Supp. 517; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 95 L. ed. 1299; *National Labor Relations Board* v. *Denver Building & Construction Trades et al*, 341 U.S. 675, 95 L. ed. 1284; *Alabama State Federation of Labor* v. *McAdory* (*Ala.*), 18 S. 2d 810.

We hold that the activities of the Union here complained of amount to a secondary boycott and such activities are prohibited.

The Union contends that its complained of picketing, advertising and other activities are constitutionally protected as freedom of speech and freedom of the press. Amend. 1, Constitution of the United States, Art. I, Sec. 9, Idaho Constitution.

A lengthy discussion of what protection is afforded by the above cited constitutional provisions and where such protection ends would simply be to re-emphazie and re-assert statements contained in many decisions.

The same contention as is here made was advanced in *State* v. *Casselman et al*, 69 Idaho 237, 305 P. 2d 1131, and decided adversely to the Union's contention.

The right to picket and exercise free speech against an employer does not authorize picketing or other conduct in such a way as to injure someone not a party to a labor dispute. *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 86 L. ed. 1143; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 95 L. ed. 1299.

The constitutional guarantee of freedom of speech and of the press is not encroached upon by affording appropriate remedies for the abuse of such privilege. *Robinson* v. *Hotel & Restaurant Employees Loc. 782 et al*, 35 Idaho 418, 207 P. 132.

We conclude the activities engaged in by the Union were not proper exercises of freedom of speech or of the press; and the Union is not in a position to claim protection on that theory.

The contention of the Union that Sec. 44-712 I.C. is unconstitutional in failing to protect minorities is not here presented for determination. The Union did not represent a majority, a minority, or any of Simplot's employees. Hence it may not challenge the statute as discriminating against minorities. *Poffenroth* v. *Culinary Workers Union Local No. 298*, 71 Idaho 412, 232 P. 2d 968.

There is no showing that either Elle or Simplot was unfair to organized labor under any definition called to our attention or of which we are aware.

The judgment is reversed and the cause remanded, with instructions to the trial court to make the temporary injunction issued in each case permanent. Costs to appellants.

TAYLOR, *C.J.*, and ANDERSON and SMITH, *J.J.*, concur.

PORTER, *J.*, sat at the hearing but did not participate in the opinion.

APPENDIX B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER

C. H. Elle Construction Co., a corporation,
Plaintiff-appellant,
v.
Pocatello Building & Construction Trades Council et al,
Defendant.
Case No. 3816

J. R. Simplot Co., a corporation, as such, and J. R. Simplot Co., a corporation doing business under name and style of Simplot Fertilizer Co., *Plaintiff,*
v.
Pocatello Building & Construction Trades Council et al,
Defendant.
Case No. 3817
Memorandum Opinion

The above cases arose out of the same state of facts and were both heard and submitted at the same time. In Case No. 3816 the C. H. Elle Construction Company is plaintiff, and that case will hereinafter be referred to as the "Elle case", and plaintiff therein will be referred to as "Elle". In case No. 3817, J. R. Simplot Company, as such, and J. R. Simplot Company doing business under the firm name and style of Simplot Fertilizer Company is plaintiff and that case will hereinafter be referred to as the "Simplot Case", and plaintiff will be referred to as "Simplot."

The defendants, Pocatello Building & Construction Trades Council, J. Russell and Francis Sherman, are defendants in both the Elle and Simplot cases, and in the Simplot case there are the following additional defendants. Electricians Local No. 449, Teamster, Chauffeurs, Warehousemen and Helpers Union No. 983, Boiler Makers Union No. 182; Pocatello Labor Council, known as the Pocatello

Central Labor Council; Clarence Lott; J. A. Russell and Mike Morelli.

Mr. George P. Phillips, of Pocatello, and Mr. Clarence Beck and Mr. Reid W. Nielson, of Salt Lake City, appear as counsel for the defendants in both of these cases. Mr. Louis F. Racine, Jr., of Pocatello, appears as counsel for plaintiff in the Elle case; and Mr. O. R. Baum, of Pocatello, as counsel in the Simplot case.

The evidence discloses the following facts:

The plaintiff in the Elle case is an Idaho corporation, engaged in the construction business in the vicinity of Pocatello, Idaho; and the plaintiff in the Simplot case is also an Idaho corporation, and is operating among, other businesses, a fertilizer plant at Don, Idaho. The defendant Pocatello Building & Construction Trades Council is an unincorporated association of persons and crafts affiliated with the American Federation of Labor hereinafter referred to as "Trade Council". The defendants J. Russell and Francis Sherman were, at the times here in question, President and Secretary, respectively, of such Trade Council. The defendant Pocatello Central Labor Council is an unincorporated association of members of various labor unions affiliated with the American Federation of Labor and have offices in the Pocatello, Idaho area. The defendants Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 983, Eleltrilians Loial No. 449, and Boiler Makers Union No. 182, which defendants will be hereinafter referred to as "the unions", are each an unincorporated association of craftsmen in one particular line of activity in the Pocatello area, and each is likewise composed of members who are affiliated with the A.F.L. The defendant J. A. Russell is business manager of Electricians Local No. 449; the defendant Clarence Lott is Secretary of the Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 983; and, the defendant Mike Morelli is Assistant Business Manager of the Boiler Makers Union 182.

For some years last past the Simplot Corporation has owned and operated a plant for the manufacture of fertilizer at Don, Idaho. It also owns other properties in Idaho, Oregon, and Nevada, and operates a phosphate mine at Gay, Idaho, on the Fort Hall Indian Reservation. Simplot ships and sells its fertilizer outside of Idaho as well as within the State.

For several years prior to July, 1952, the defendant Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 983, was the collective bargaining agent of Simplot's fertilizer plant employees, but on July 29th, 1952, pursuant to directions of the National Labor Relations Board, an election was held by the production and maintenance employees at the fertilizer plant and at such election the Oil Workers International Union, C.I.O., was selected by a majority of the said employees and thereafter, said C.I.O. union was duly certified by the National Labor Relations Board as the bargaining agent for the production and maintenance units at the fertilizer plant.

On or about July 1st, 1952, Simplot entered into a verbal contract while Elle to do certain construction work at Simplot's fertilizer plant at Don, Idaho, such verbal contract being confirmed by letter reading as follows:

C. H. Elle Construction Company
309 Yellowstone Avenue
Pocatello, Idaho
Attn: C. H. Elle
Gentlemen:

This is to confirm previous conversations between members of your firm and those of the Simplot Fertilizer Company, including Mr. Simplot, Larry Buhler, Construction Engineer, and the writer, with regard to the C. H. Elle Construction Company agreeing to perform such services as are incident to the conversion of our present facilities from maunfacturing single super phosphate to the more concentrated product.

Inasmuch as the design and layout of the plant is being done by Mr. Buhler and his assistant, Mr. Ohms, without the assistance of an outside engineering firm, it is conceivable that the work to be performed by your Company will not be of a continuous nature, and under the circumstances we will give you as much notice as possible in connection with the work to be done by your firm. Mr. Buhler will be in charge of the construction, and purchases pertinent to the construction will be handled through Mr. Richins, Purchasing Agent, and approved by Mr. Buhler.

It is our intent to have your company do all of the forming work, machinery erection and installation pertinent to the conversion. We know that our interest is identical with yours, from a standpoint of efficiency of man power, and naturally assume that you will always furnish qualified workers to perform the specific job at hand.

Inasmuch as we have not been successful in processing our conversion plant through the various channels in Washington, including the A.E.C., it is necessary that we do this job without securing special priorites, nor, as a matter of information to you, did we receive a Certificate of Necessity which carries with it the five year tax amortization provision. I mention our inability to secure priority because there is in my mind no question but what we will encounter delay in securing certain items. In many instances we undoubtedly will have to manufacture many of our stainless steel tanks and bins. We do feel, however, that by using our own man power for this purpose we will be able to complete the job somewhat on schedule. Even though we find it necessary to build much of the equipment, there is an advantage to be gained in so doing in that our men will be acquainted with the finished plant from top to bottom, and if something doesn't work just as it should they should readily know why.

Preliminary investigations on the part of our Purchasing Agent indicates that with just a bit of good luck on our part, we will be able to secure sufficient stainless steel, which incidentally is one of the more critical but very essential items when manufacturing phosphoric acid.

Payment for contractural services performed by your Company will be the same as in the past.

Mr. Buhler will be in touch with you at a later date as to when the services of your firm will be required.

Very truly yours,

SIMPLOT FERTILIZER CO.

/s/ E. W. HANSEN, *Manager.*

Simplot and Elle had previously, at various times, entered into somewhat similar cost plus fee contracts under which Elle had done construction work for Simplot.

Elle is engaged in the building and construction business in Southeastern Idaho and has its principal place of business at Pocatello, all its building and construction employees are members of unions affiliated with the American Federation of Labor, and it is a member of the Southeast Idaho Contractor's Association, and has contracted with defendant Trade Council to employ only A. F. of L. Craftsmen.

Elle started work at the fertilizer plant pursuant to said contract with Simplot sometime during the fall of 1952, and its employees were performing construction work in October, 1952 at the time the present trouble arose.

Elle had from time to time made requests of defendants for A. F. of L. carpenters, and craftsmen and had not been furnished with all such craftsmen it needed on the job and had on a few occasions made use of Simplot's plant employees to help with some of the work. Mr. Sherman, the Secretary of the defendant Trade Council, found some of Simplot's plant personnel working with Elle's employees on the Simplot construction job and about the same time learned that Simplot was having steel tanks, that were to be installed on the job, fabricated by its production or

maintenance workers rather than by Elle's construction workers and defendants thereupon made complaint to Simplot, claiming that such fabrication work was construction work and advised Simplot and Elle that defendants A. F. of L. craftsmen must either do all the new construction work or none at all.

On October 2, 1952, a meeting was held in O. R. Baum's office in Pocatello, at which meeting Simplot, Elle and the defendant Trade Council were represented by officials of each, and some of the defendant unions were also represented. This meeting appears to have been held for the purpose of talking over their differences. There is considerable testimony in the record concerning conversations relative to a $2.00 per week permit, but it appears this subject was discussed simply as a possible compromise and was dropped upon the meeting being advised by one of the union officials that such a practice would be illegal, and therefore has little, if any bearing on the issues before the court.

At this meeting the question of having production or maintenance workers help Elle's employees on work assigned to Elle was also discussed and it appears to have been agreed that such practice was to be discontinued in the future.

The meeting, however, broke up without agreement on the question as to fabrication of steel tanks by Simplot's maintenance and production workers, Simplot refusing to meet defendants' demand that defendants' craftsmen be allowed to do such work which they construed to be construction work, and defendants insisting that they either be permitted to do all construction work at the plant or none at all.

At the times here in question Simplot had on its payroll at the fertilizer plant two carpenters and an electrician who were regular employees doing maintenance work. These employees and perhaps others were members of A. F. of L. craft unions, but defendants do not claim to be bar-

gaining agents for such plant employees and did not intend to represent or speak for them in this dispute over construction work.

Simplot continued to refuse to give the A. F. of L. craftsmen the work of fabricating the steel tanks in question and on October 13, 1952, while Elle's employees were engaged in construction work at the Simplot fertilizer plant, the defendant Trade Council under authorization of its members and acting through its Secretary, Mr. Francis Sherman, instituted a picket line at the entrance (there being but one) to the fertilizer plant at Don, Idaho, and displayed placards reading

> "Simplot Fertilizer Company unfair to organized labor Pocatello Building and Construction Trades Council A. F. of L."

The defendants also thereupon caused to be sent to various business concerns in the Pocatello, Idaho, area, and to employers of A. L. of L. members coming under the jurisdiction of the defendant Trades Council, notices informing them that the Boilermakers' Local No. 182 had placed the Simplot Fertilizer Company on their unfair list.

Upon the establishment of the picket line Elle and its A. F. of L. employees refused to cross the picket line so established at the entrance of Simplot's Don, Idaho, plant, and the few Elle workmen who were working at the phosphate mine at Gay, Idaho, also quit work upon notice of Simplot being placed on unfair list by defendants. And all A. F. of L. truck drivers or handlers of construction materials and building supplies refused to pass picket line.

These activities complained of by plaintiff were directed towards Simplot, but not towards its employees, and Simplot's production and maintenance crew as well as its office workers and other plant personnel continued to pass the picket line without interference or threats, and Elle's A. F. of L. employees still continued to work on all other contract jobs Elle had except those with Simplot.

The picketing was in all respects peaceable, and no

violence, breach of the peace, or threats appear to have been made in connection therewith.

It is the contention of both plaintiffs that neither Elle or Simplot are parties to a labor dispute as such term is to be construed under the laws of this State and both contend that defendants have violated Idaho's Secondary Boycott Act. Simplot also alleges that the acts of defendants constitute an unlawful conspiracy. Both Elle and Simplot are here seeking injunctive relief.

Idaho's Secondary Boycott Act reads as follows:

> "It shall be unlawful to cause or threaten to cause, and/or combine or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or compel the party with whom such labor dispute exists to comply with any particular demands."

Our Idaho statute defines labor disputes as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives."

The defendants deny that the acts complained of are unlawful and among other defenses urge that their acts were an exercise of free speech protected by the 1st and 14th Amendments of the Constitution of the United States and by Article I, Sections 9 and 10, of the Constitution of Idaho.

The Court finds that the defendants' purpose in instituting the picket line, putting Simplot on its unfair list, and

advertising such fact, was to publicize their objective that their construction workers do all construction work on the job or none at all.

We are thus confronted with the question whether such objective is a lawful one, such as is protected by our State or Federal constitutions.

In the case of *Bakery & Pastry Drivers, etc.* v. *Wehl*, 72 S. Crt. 816, 315 U.S. 769, where Supreme Court of the United States had before it a case where the state court had refused a request to find that the public accurately and truthfully and without violence or breach of the peace, Mr. Justice Jackson in the majority opinion stated:

> "So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

And Mr. Justice Douglas concurring said:

> "But since dissemination of information concerning the facts of a labor dispute is constitutionally protected, a state is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly."

In the case of *Thornhill* v. *State of Alabama*, 60 S. Ct. 736, at p. 744, the Supreme Court of the United States said:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

In the case of *American Federation of Labor* v. *Swing*, 61 S. Ct. 568 at 570, the Mr. Justice Frankfurter delivering the opinion of the Court said:

> "All that we have before us, then is an instance of 'peaceful persuasion' disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion 'imminent and aggravated danger'. Thornhill vs. Alabama, 310 U.S. 88, 106, 60 S. Ct. 736, 746, 84 L. Ed. 1093. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him. Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the motion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether these limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interests of all engaged in the same industry has become a commonplace. American Foundries v. Tri-City Council, 257, U.S. 184, 209, 42 S. Ct. 72, 78, 66 L. Ed. 189, 27 A.L.R. 360. The right of free communication cannot therefore be mutiliated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected by Thornhill's case.

> 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn v. Tile Layers Union, 301 U.S. 468, 478, 57 S. Ct. 857, 862, 81 L. Ed. 1229."

Simplot says that in view of the fact that there is no dispute between it and its own production and maintenance employees who are all in a collective bargaining unit of which the Oil Workers International Union C.I.O., is their representative, that it cannot be said that Simplot is a party to a "labor dispute" under the statutory definition of labor dispute *supra*. While technically the A.F. of L. construction workers are direct employees of Elle and not of Simplot, Simplot's engineers direct their work, and can shut down operations at any time. The cost plus fixed fee contract existing between Simplot and Elle is such a one that we must say that while relationship of employer and employee does not technically exist between Simplot and Elle's A.F. of L. construction workers, there does exist a relationship of owner, having general control over the work to be done, and of workers doing the work as directed by such owner. This relationship under the particular facts before us is similar to that of employer and employee except that the contractor Elle intervenes, with a cost plus fixed fee contract technically making him the direct employer and the A. F. of L. workmen his employees rather than the employees of Simplot.

Unquestionably the A.F. of L. construction crew workmen, if employed by Simplot direct, could have said "we must either do all the construction work or none."

I do not believe that the Statute 44-801 can be so construed, that simply because of such a contract as we have before us between Simplot and Elle, defendants' construction workers may not take the same stand without rendering themselves criminally liable. Any such interpretation of such statute would quite clearly render the statute unconstitutional.

I am of the opinion that the defendants' objective in instituting the picket line, putting up placards, and advertising the fact that they considered Simplot unfair to organized labor was a legitimate one protected by the constitutions of both the Federal and State Government as long as orderly and peacefully conducted and placards and advertising remained truthful.

The pertinent provisions of Section 44-703 I.C. reads as follows:

> "No court, nor any judge or judges thereof shall have jurisdiction to issue any restraining order or temporary or permaennt injunction which in specific or general terms prohibits any person or persons from doing, whether singly or in concert any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement to do such work or to remain in such employment; • • • (e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method, not involving fraud, violence, breach of the peace, or threat thereof; • • •."

Quoting also from parts of Section 44-706 I.C.:

> "No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof; • • •
>
> d) That no item of relief granted is relief that a court

or judge thereof has no jurisdiction to restrain or enjoin under Section 44-703; * * *."

It is to be noted that the provisions of Section 44-703 are not expressly limited to a "labor" dispute as in the case in some of the other sections of the chapter, but this section simply uses the word "any dispute", thus differing from the Norris-LaGuardia Act, from which our anti-injunction law appears to have been largely taken, where the words "labor dispute" are used in place of our statutes "any dispute".

I appreciate that if there were no dispute between Simplot and defendant's construction workers, Section 44-703 would not then be binding upon this court. *Tarr* v. *Amalgamated Ass'n. of Street Electric Ry. & Motor Coach Employees of America*, 73 Idaho 223.

It is, however, clear to my mind that one cannot say that as far as Simplot is concerned that there was not "any dispute" existing between it and the defendants.

This use of the words "any dispute" instead of "labor dispute" by our legislature clearly indicates to my mind a legislative intent to exclude from this court's jurisdiction to grant injunctive relief in cases such as the Simplot case, as well as cases in which employer had a similar dispute with his own plant workers.

I am therefore of the opinion that injunctive relief prayed for in the Simplot case must be denied.

In the Elle case we have a somewhat different situation as witnesses on both sides testified that there was no dispute between Elle and defendants.

The purpose of defendants in instituting the picket line here in question was not directed at Elle nor can I find any intent to injure Elle or to bring it into a concerted plan to coerce or inflict damage upon Simplot as alleged by Elle.

Elle's loss of fees which may have resulted because of his workers refusal to cross the picket line appear to me to

be but incidental to being an employer of A.F. of L. labor and of its contract with the defendants' Trade Council.

It is to be noted that defendants did not picket any of the other construction jobs that Elle had at the time except those it was working on for Simplot. And the evidence disclosed no coercion or threats by the defendants against Elle.

Elle as an A.F. of L. contractor should take cognizance of all legal objectives of his employees and their representatives. Elle may have incidentally lost some fees, and his A.F. of L. employees some wages, but its losses are but incidental to a picket line just as its A.F. of L. employees' losses of wages were, and as such A.F. of L. contractor it cannot properly complain as the rule *damnum absque injuria* would appear to apply.

Elle was so closely identified with both Simplot and the defendant unions as to indicate it also had an interest in the dispute. Elle's contract with Simplot called attention to the fact that Simplot intended to have its maintenance workers in the fertilizer plant fabricate the tanks and Elle cannot now say it is an entirely innocent party to the dispute when with full knowledge of Simplot's intentions it entered into the contract in question under which Elle now seeks to require its A.F. of L. workers to work upon a job in conflict to one of the objectives of the unions of which they were members.

Among other questions raised is the question as to whether in view of the Labor Management Act of 1947 this court has jurisdiction, it being contended that Congress has entirely preempted the subject matter of this litigation.

The Labor Management Act of 1947 only applies to unfair labor practices affecting commerce.

Elle is an Idaho corporation with its principal place of business at Pocatello. It is engaged in the building and construction business and operates in the vicinity of Pocatello, confining its operations to Southeastern Idaho.

In the case of *Sperry* v. *Denver Building and Construction Trade Council,* 77 F. supp. 231, which arose out of attempts of labor unions to compel contractors in Denver, Colorado, to refuse to let subcontracts for electrical work to two electrical contractors who refused to sign up with unions, the court held such matter purely "intrastate" though interstate commerce might have been indirectly affected, and quoted from the opinion of the Supreme Court of the United States written by Chief Justice Hughes in the case of *Schechter* v. *United States,* 97 A.L.R. 947, at 967, where Justice Hughes quotes with approval from *Industrial Association* v. *United States,* 45 S. Ct. 403, "The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the same case at page 970 Justice Cardozo in his concurring opinion said, "activities local in their immediacy do not become interstate and national because of distant repercussions."

In *Mills* v. *United Association of Journeymen, Etc.,* 83 F. supp. 240, it was held that where building in which subcontractors were engaged, was to be used for the mixing and bottling of a soft drink beverage, and material for the finished product and means of distributing it, were in part purchased and shipped across state lines, persons employed in the building were not engaged in "commerce" or in producing goods for commerce within the Taft-Hartley Act and the Federal Court was without jurisdiction of sub-contractors action.

I am of the opinion that Elle and his employees were not "in commerce" and that the National Labor Relations

Board does not have jurisdiction. There consequently is no available remedy to be exhausted before that Board as contended by defendants.

I am of the opinion that while the Elle case is one clearly within our jurisdiction, the facts do not justify our granting the relief prayed for, it being our conviction that defendants' acts concerning which Elle complains are lawful and protected by the Constitution.

Therefore, judgment will be for the defendants in both the Simplot and Elle cases, and counsel for defendants may prepare suitable Findings of Fact, Conclusions of Law, and Judgment, serve on opposite counsel and then submit to me for my signature. If counsel for plaintiff have any objection to papers so served, they will within ten (10) days file their objections with suitable suggestions for amendments to meet any such objections.

I wish to thank counsel on both sides for the extraordinary amount of work they have put in on these two cases and for the able assistance they gave me in what I have found to be unusually difficult assignments.

Dated this 16th day of November, 1953.

sg/ D. H. SUPHEN
Presiding Judge

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136 ff, 29 U.S.C. 151 ff, are as follows:

"DEFINITIONS

"SEC. 2. When used in this Act—

• • • • • • • • •

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

• • • • • • • • •

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

• • • • • • • • • •

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding 12 months received from the Board a notice of compliance with sections 9(f), (g), and (h) and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the

employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

• • • • • • • • • •

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • • • • • • •

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

• • • • • • • • • •

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign

particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;"

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency or any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

NO. 372

OCT 1 19

JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL and FRANCES SHERMAN,

Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,

Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL; FRANCES SHERMAN; ELECTRICIANS LOCAL NO. 449; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 983; BOILERMAKERS UNION NO. 182; POCATELLO LABOR COUNCIL, known as the POCATELLO CENTRAL LABOR COUNCIL; CLARENCE LOTT; J. A. RUSSELL and MIKE MORELLI,

Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS

L. E. HAIGHT
Continental Bank Bldg.
Boise, Idaho

O. R. BAUM
RUBY Y. BROWN
P. O. Box 570
Pocatello, Idaho

L. F. RACINE
Itex Building
Pocatello, Idaho

Attorneys for Appellees

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Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,

Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association; J. RUSSELL; FRANCES SHERMAN; ELECTRICIANS LOCAL NO. 449; TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION NO. 983; BOILERMAKERS UNION NO. 182; POCATELLO LABOR COUNCIL, known as the POCATELLO CENTRAL LABOR COUNCIL; CLARENCE LOTT; J. A. RUSSELL and MIKE MORELLI,

Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

MOTION TO DISMISS

Appellee C. H. Elle Construction Co., and Appellee J. R. Simplot Company, pursuant to Rule 16 of the Revised Rules of this Court, each move to dismiss the appeal in each of the above entitled cases, on the grounds (a) that the appeals, and each of them, do not present a substantial federal question, (b) that the federal questions sought to be raised

were not, in either of such cases, timely or properly raised or expressly passed upon by the court below, and (c) that the judgment in each case rests on an adequate non-federal basis.

STATEMENT OF CASE

The two cases under consideration are companion appeals[1] from final judgments and the decision of the Supreme Court of the State of Idaho, reversing judgments in each case of the trial court, the District Court of the Fifth Judicial District of the State of Idaho, in and for Power County, Idaho. Appellees have obtained the Record paging as used by the appellants and have numbered their transcript likewise, and in referring to the contents of the transcript will indicate the Record page numbers.

The Supreme Court of Idaho, in reversing the judgments of the Idaho District Court, found that the activities of the defendant Unions in picketing the entrance to the J. R. Simplot Company Plant at Don, Idaho, and otherwise forcing economic sanctions upon C. H. Elle Construction Co., and J. R. Simplot Co., were in violation of the Secondary Boycott Act of Idaho, Secs. 44-801 to 44-803, Idaho Code, that no labor dispute existed, that the activities of the Unions were not proper exercises of freedom of speech or of the press, and that the temporary injunction originally

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[1] Although filed as separate appeals, the appellants in Cases Nos. (Idaho Supreme Court) 8174 and 8175 have filed a joint statement as to the jurisdiction in the two appeals. Both appeals are presented on a single record. Appellees C. H. Elle Construction Company, a corporation, and J. R. Simplot Company, a corporation, and J. R. Simplot Company, a corporation doing business under the firm name and style of Simplot Fertilizer Company, have filed their motion to dismiss the appeals or affirm the judgments as a single instrument in the two cases.

issued by the trial court, in each case, should be made permanent.[a]

The Idaho trial court found against Simplot and Elle and in favor of the Pocatello Building & Construction Trades Council. Counsel for the defendant Pocatello Building Trades Council, et al, prepared Findings of Fact, Conclusions of Law, and a Decree in each case, and the trial Court thereafter signed the same. Hence the appellants in the Idaho Supreme Court were Simplot and Elle. No cross-appeal was taken by the appellants herein as to the judgment that was finally rendered in each case by the trial court, although the Findings of Fact and Conclusions of Law as entered by the trial court and upon which the decree appealed from was based, contained the following:

In the Elle case:

Findings of Fact 8 (R. 482):

> "8. That the business of the plaintiff herein does not affect or constitute interstate commerce within the meaning of the Labor Management Relations Act of 1947, 39 U. S. C. 151, et seq."

Conclusions of Law numbered 2, 3, 4 (R. 482):

> "2. That plaintiff is not engaged in interstate commerce within the meaning and scope of the Federal Labor Management Relations Act of 1947, 29 U. S. C. 151 et seq.
>
> "3. That the Court's power and jurisdiction herein is not preempted or supplanted by the Federal Labor Management Relations Act of 1947, 29 U. S. C. 151, et seq.

[a] Appendix A., Jurisdictional Statement, P. 22-31.

"4. That the conflict exisiting between the rules, regulations and objectives of the defendants and the conditions and building contract provisions prevailing at and pertaining to the Simplot Fertilizer Company's conversion job, respecting which plaintiff required his employees to work, constituted a dispute between plaintiff and defendants."

And in the Simplot case:

Findings of Fact numbered 8, 13, and 15 (R. 446):

"8. That during the summer of 1952 the plaintiff commenced a major conversion and re-construction of its Don, Idaho plant to change the product therefrom from one kind of fertilizer to a different kind of fertilizer which necessitated the change in much of the facilities and equipment of the said plant; and that there was no labor dispute exisiting between the CIO Oil Workers International Union and the plaintiff or its employees.

"13. That defendants have not been certified by the National Labor Relations Board as a bargaining agent for plaintiff's employees.

"15. That a 'dispute' arose and existed between plaintiff and the defendants within the meaning of Section 44-703, Idaho Code."

Conclusions of Law numbered 1, 3 and 4 (R. 446-447):

"1. That a dispute existed between the respective parties hereto within the meaning, scope and perview of Section 44-703 Idaho Code.

"3. That the power and the authority of this court to hear and determine this cause is not preempted or supplanted by the provisions of the Labor Management Re-

lations Act of 1947, 29 U. S. C. 151, et seq.

"4. That the defendants' picketing and advertising activitiy herein did not constitute a wrongful or unlawful secondary boycott of the plaintiff or others."

In the Elle case Findings of Fact are numbered 1 to 8, inusive, and Conclusions of Law are numbered 1 to 8, inclue (R. 480-483.) In the Simplot case Findings of Fact are umbered 1 to 16, inclusive, and Conclusions of Law are umbered 1 to 6, inclusive. (R. 441-447.)

No cross-appeal from the Findings, Conclusions, and dgments, was taken by appellants.

The Statement of Appellants refers to "Labor Board roceedings."[3] The fact is that there were never any Labor oard proceedings involved in this dispute as to either of the pellees, and the issues and problems presented by the apal did not involve any proceedings before the Labor Board. t no time was any attempt ever made by any of the parties this appeal to take the problems and issues here presented fore the National Labor Relations Board. The labor proedings before the National Labor Relations Board referred by appellant (Jurisdictional Stmt. P. 13) had to do with prior unrelated matter long before the instant matter and t involving Elle Company in any fashion. (R. 5-6).

The Dispute: During the summer of 1952 the Simplot mpany undertook to convert its fertilizer plant from the oduction of single phosphate to triple super phosphate, and the course of accomplishing that conversion contracted ith C. H. Elle Company on a cost plus basis, to do forming ork, machinery erection and installation incident to that

[3] Jurisdictional Statement, p. 4.

conversion (letter dated July 1, 1952; R. 302-303, 443).[4] Simplot Company reserved to itself, and did not contract with the Elle Company, the fabrication of certain stainless steel tanks and parts that were required in the new plant. The Unions, appellants herein, determined that they were going to do all work, including fabrication of the tanks and small parts, or none at all; that to force Simplot to give that portion of the conversion to the Elle Company or to some other AFL contractor they would picket the Simplot plant (R. 108-110). The Simplot company had no AFL employees involved in the dispute and appellants did not represent any employees of the Simplot plant involved in this matter (R. 108, F. 157). The appellants represented only employees of the Elle Construction Company (R. 108). The record is replete with assertions of representatives of the appellant Unions that no dispute existed between Elle Company and its employees who were members of the appellant Unions (R. 111 and 118). However, by placing a picket at the entrance to the Simplot plant the appellant Unions expected that Elle's employees would not cross the picket line. (R. 110-112). Although Simplot employees, not members of appellant Unions, would cross the line, the construction work would be effectively stopped, because that work was being accomplished by Elle employees. Thus the appellant Unions planned to, and did until the trial court issued a temporary injunction, prevent both the Simplot Company and the Elle Company from proceeding with the work of conversion. This was done in spite of the fact that Simplot had no employees represented by appellant Unions (R. 108) and therefore could not be in a labor dispute with appellant Unions.

The trial court found that a dispute (as distinguished

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[4] See Appendix B, Jurisdictoinal Statement, pp. 34, 35, 36.

from a labor dispute) existed between the respective parties within the meaning, scope and purview of Sec. 44-703, Idaho Code, and this finding was made notwithstanding the fact that Title 44, Chapter 7, Idaho Code, Sec. 44-703 being a part of such Title and Chapter, defined a labor dispute. Such a finding was held erroneous by the Idaho Supreme Court. The trial court finding was made in spite of the fact that the Elle Company had no dispute with any of its employees. The only true object of the Unions was the desire of the additional work of fabrication, which was not covered by the Elle contract with the Simplot Company and was not a legitimate item which the Unions could insist that Simplot give Elle's employees.

The trial court did determine in each case, that is to say, in the Simplot case and in the Elle case, that its jurisdiction was not supplanted by the National Labor Relations Act. But the trial court found that the Secondary Boycott Act of Idaho was not applicable and that the activtiies of the Unions were protected activities within the Constitution of the United States and the State of Idaho. The entire decision of the trial court was based, in both cases, on grounds other than the "Commerce Clause" and the Labor Management Act of 1947.[5]

The Supreme Court of Idaho found that the dispute must be one that is not foreign to the relationship of employer and employee, or between labor and management.[6] The Supreme Court of Idaho likewise found that the dispute was not one coming within the purview of Secs. 44-701 to 44-713, Idaho Code, and that the matters and things complained about were violative of the provisions of the Secondary Boycott Act, Secs. 44-801 to 44-803, Idaho Code.

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[5] Finding of Fact, Simplot Case No. 15, R. 446; Conclusion of Law 3, R. 447.

[6] Appendix A, Jurisdictional Statement, p. 29.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND IN ANY EVENT WERE NOT TIMELY OR PROPERLY RAISED AND THE JUDGMENT OF THE SUPREME COURT OF IDAHO RESTS ON ADEQUATE NON-FEDERAL BASIS.

Briefly stated, the questions presented by appellants are whether:

1. The cases are within the jurisdiction conferred upon the National Labor Relations Board by the National Labor Relations Act.

2. The state courts of Idaho as a consequence are without power to exercise any jurisdiction over the factual matters presented to the Idaho courts in these cases.

Appellants do not urge upon this Court any other basis for this appeal than the contention that the Idaho Courts had no jurisdiction. We do not believe that the questions presented are of a substantial federal nature, for the reason that no labor dispute as defined by the statutes of Idaho or by the Labor Management Relations Act were here involved and the acts of appellants were contrary to the announced public policy of Idaho.

The pertinent Idaho statutes are the following:

> "44-712. Labor dispute defined. — The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives.
>
> "44-801 (Secondary Boycott Act). It shall be unlawful to cause or threaten to cause, and/or combine

> or conspire to cause or threaten to cause, injury to one not a party to the particular labor dispute, to aid which such boycott is initiated or continued, whether by (a) withholding patronage, labor, or other beneficial business intercourse; (b) picketing; (c) refusing to handle, install, use or work on particular materials, equipment or supplies; or (d) by any other means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another or to compel the party with whom such labor dispute exists to comply with any particular demands."

National Labor Relations Act as amended, Sec. 2 (9), 29 U. S. C. 151 ff, provides:

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether the disputants stand in the proximate relation of employer and employee."

The Supreme Court of Idaho did hold the state court's jurisdiction had not been supplanted by the Federal Labor Act, and cited cases in support from its Court as well as this Court. (Jurisdictional Statement—Appendix A, P. 27-28).

I. THE SUPREME COURT OF IDAHO HAD JURISDICTION TO HEAR THESE CASES AND PROPERLY EXERCISED IT.

While it is true that the appellants herein stated in their Answer that the matters in controversy were exclusively within the jurisdiction of the National Labor Relations Board, the appellants did not, after the trial court had handed

down its memorandum decision and Findings of Fact and Conclusions of Law and decree were entered in each case, file a cross-appeal. Hence the only matters directly before the Supreme Court of the State of Idaho were those matters and things contained in the Assignment of Errors as set forth in the briefs prepared by the appellees here. The Trial Court found Elle not to be in interstate commerce and both Elle and Simplot not to be in such activity as would give the National Labor Board exclusive jurisdiction.

The fact that Simplot may have or may not have been dealing in interstate commerce plays no important part in this matter, as the dispute, if there ever was a dispute, whatever it might have been, was not a labor dispute and the picketing was against the public policy of the State of Idaho, as announced by the legislature and the judiciary of the state, and prohibited.

Journeymen Plumbers v. Graham,
345 U. S. 192; 97 L. Ed. 946;

Building Service Employers v. Gazzam,
339 U. S. 532; 94 L. Ed. 1045;

Teamsters Union v. Hanks,
339 U. S. 470; 94 L. Ed. 995;

Giboney v. Empire Storage & Ice Co.,
336 U. S. 490; 93 L. Ed. 834;

Thornhill v. Alabama,
310 U. S. 88; 84 L. Ed. 1093;

Chucales v. Royalty (Ohio),
163 O. S. 373; 127 NE 2d 203;
Cert. denied U. S. Supreme Court May 7, 1956;

Pappas v. Stacey (Maine),
116 A. 2d 497;
Appeal dismissed Oct. 24, 1955,
76 S. Ct. 117;

Gilbertson v. Culinary Workers (Ore.),
282 P. 2d 632 (organizational picketing prohibited by statute);

Voght Inc. v. I. B. T. Local 695 (Wisc.),
74 NW 2d 749;

Poffenroth v. Culinary Workers Union Local,
71 Idaho 412; 232 P. 2d 968;

Tarr v. Amalgamated Assn. of Street Electric Ry. & Motor Coach Employees of America,
73 Idaho 223; 250 P. 2d 904;

State v. Casselman,
69 Idaho 237; 205 P. 2d 1131;
Cert. denied 94 L. Ed. 554;
Rehearing denied 94 L. Ed. 588.

THE JUDGMENT IN EACH OF THE CASES HERE INVOLVED RESTS ON ADEQUATE NON FEDERAL BASIS.

A reading of the decision of the Supreme Court of Idaho can lead, we think, fairly to the conclusion that the case rests on an adequate non-federal basis, in this—

(1) No labor dispute existed between the CIO Oilworkers International Union and Simplot or the employees of Simplot;

(2) The dispute, if there was a dispute, was clearly distinguishable from a labor dispute;

(3) The Union set itself up as the construction unit for all Southeastern Idaho, and this position was taken notwithstanding the fact that it did not have any contract with Simplot or any of the Simplot employees;

(4) If the Unions desired Elle not to work and Elle's employees not to work then the picketing should have been directly against Elle rather than Simplot. But the fact was the Union had no dispute with Elle and wanted Simplot to give the Elle company more work.

(5) Elle's activities were based on the contract he had with Simplot, and Elle could go no further than do the work that he contracted to do. The AFL Unions, representnig Elle employees, did not picket Elle directly because they had no dispute with Elle, but they did attempt to force upon Simplot the assignment of work to Elle by picketing Simplot at the single entrance to the Simplot Plant, knowing Simplot employees would cross but Elle's men would not.

The Idaho Supreme Court found the contention of the Union that it had no jurisdiction in the matter and that all questions that were in dispute had been pre-empted and supplanted and covered by the Federal Act not well taken.[7] The cases cited under subheading I of this brief we believe fully support such action of the Idaho Supreme Court.

The questions the appellants seek to raise in the instant matter were not expressly passed upon by the court below for the reason the appellants never saw fit to cross-appeal from the decision of the Idaho Trial Court. The Supreme Court of the State of Idaho found that the anti injunction statute, 44-701 to 44-713, Idaho Code, covers certain regulations and relationships between labor and management and

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[7] Jurisdictional Statement, pp. 27 and 28.

that the dispute referred to in Subdivision (e) of Sec. 44-703, Idaho Code, means a labor dispute as defined by Sec. 44-712, Idaho Code, and not a dispute foreign to that relationship.[8]

Reference is made in the Jurisdictional Statement to the fact that one Hilbun was informally consulted[9], and a reading of the record as to just what took place in the office of O. R. Baum discloses that Mr. Hilbun was discussing other matters and that during a phone call some conversation was had and the suggestion was made as to a meeting. The Union at no time ever sought to submit the matter to the National Labor Relations Board and took no steps either before or after the actions in question had been filed to have the matter submitted to the Board. This fact, we think, is sufficient to show that the decision of the Idaho Supreme Court rests on an adequate non-federal basis and the Union so recognized in failing to cross-appeal from the Trial Court's Judgment and Conclusions that the Idaho Court had jurisdiction and in failing to attempt to secure a hearing before the National Labor Relations Board.

Appellants assert that the illegality of the Union conduct is fully regulated by the federal act and refer to Sec. 8 (b) (4) (D), 8 (b) (4) (C), and 8 (b) (4) (A) of the Taft-Hartley Act, and then cite cases in support of their interpretation of each of the subdivisions of such section. Appellants take the position that peaceful picketing as conducted in the instant case is violative of Sec. 8 (b) (4) (A). No precedent exists for this conclusion, and we believe that such a conclusion is contrary to decisions beginning in 1949, and we do not believe Congress has outlawed under the Taft-Hartley

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[8] Jurisdictional Statement, Appendix A, p. 29.
[9] Jurisdictional Statement, p. 19.

Act such activities as were carried on in the instant matters.[10] However, such activities were positively violative of the public policy of Idaho.

One of the matters that undoubtedly convinced the Idaho Supreme Court the dispute was something other than a labor dispute and perhaps was quite persuasive in the Idaho Court arriving at its's decision, was the evidence pertaining to the activtiies of the Unions in reference to the demand for $2 per man per week.[11] Such conduct illustrated the desire to secure monies but recognized that the Simplot men from whom such monies were sought were in no fashion represented by the Unions.

The appellants ask this Court to disregard the fact that Simplot employed no members of the appellant Unions, and to disregard the fact that the appellant Unions avowed they had no labor dispute with Elle Company and no labor dispute with Simplot. The appellants further request the Court to disregard the public policy of the State of Idaho as announced by its legislature and by its courts; likewise, this Court is asked to disregard the fact that appellants took no cross-appeal. The picketing was not protected or lawful picketing under any view, either under Idaho law or under Federal law. No attempt was made by any of the parties to seek a ruling from the National Labor Relations Board, and, in fact, the factual situations were not such that that Board would have acted. In such a situation the appellees sought relief in the state court, there being sound legislative act and

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[10] Jurisdictional Statement, pp. 27 and 28.
[11] Jurisditional Statement, p. 26.

judicial decision supporting the entitlement of the appellees to relief in the state courts.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 272

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,
Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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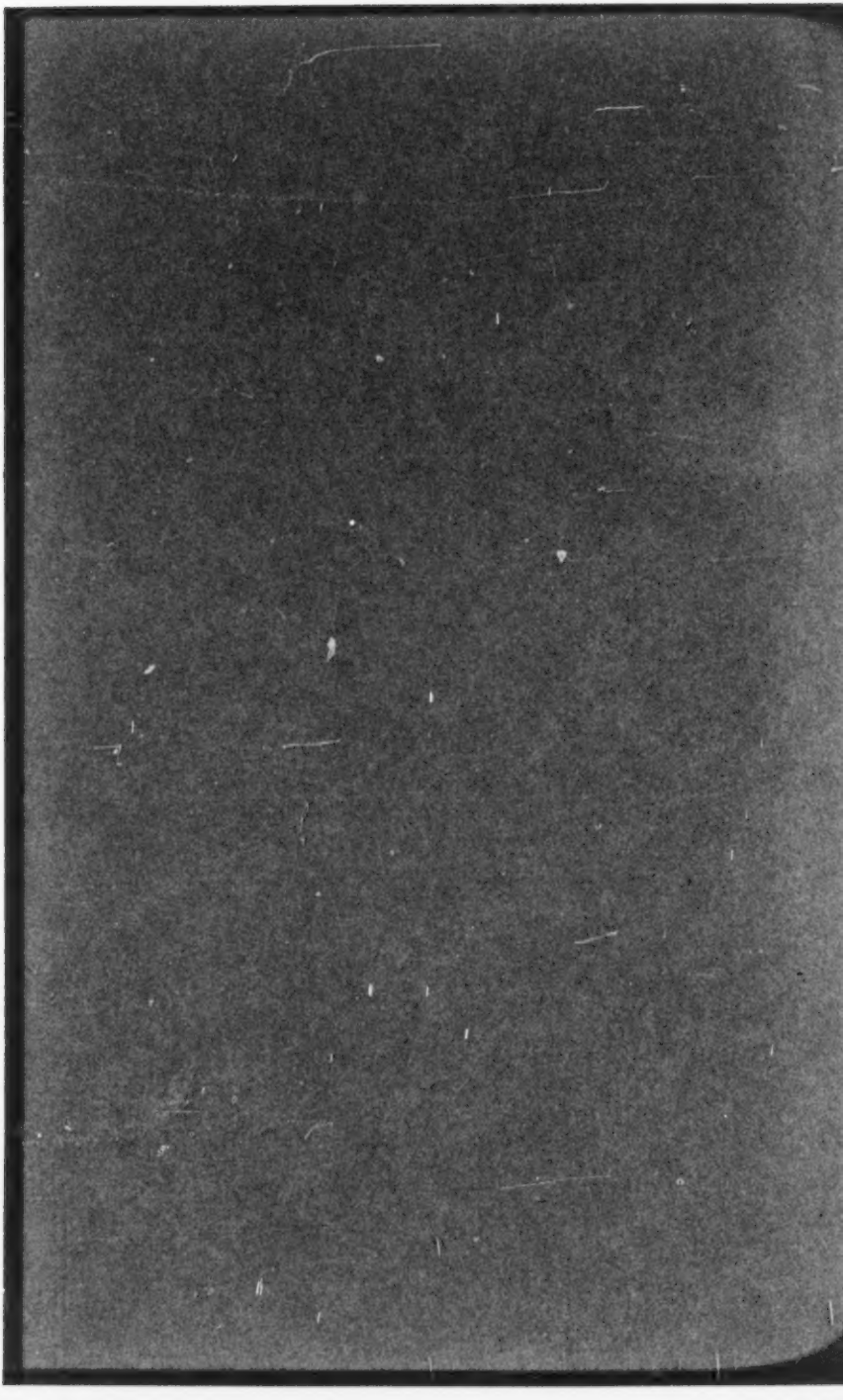

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 372

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation,
Appellee.

POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL, an unincorporated association, et al.,
Appellants,

vs.

J. R. SIMPLOT COMPANY, a corporation, as such, and J. R. SIMPLOT COMPANY, a corporation, doing business under the firm name and style of SIMPLOT FERTILIZER CO.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees make little attempt to meet appellants' contention that the jurisdiction of the Idaho courts over these cases was preempted by the National Labor Relations Act. Instead they assert that the preemption issue was not before the Idaho Supreme Court because:

(1) Appellants did not file cross-appeals from the judgments of the District Court in their favor.

(2) The Idaho Supreme Court did not view the cases as involving a "labor dispute".

(3) Appellants made no attempt to submit the case to the National Labor Relations Board.

Only the second of these contentions rises above the puerile, and it is disposed of adversely to appellees by *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 479-480, 75 S. Ct. 480, 487.

I

The District Court rejected appellants' contention that it had no jurisdiction because the field was preempted by the National Labor Relations Act, but entered judgments in favor of appellants on the merits. See Jurisdictional Statement, 13-14. It is hornbook law that

> "an appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560.

Appellees cite no case suggesting that a different rule prevails in Idaho, nor have we been able to find any.

Further, Idaho follows the usual rule that "Objections to the jurisdiction of the court are never waived." *Aram* v. *Edwards*, 9 Idaho 333, 337, 74 Pac. 961. See Idaho Code Annotated (1948), 5-611; Vol. 2, Supplement, p. 501.

Finally, and in any event, the Idaho Supreme Court did consider and decide the issue of preemption by the National

Labor Relations Act. It said (Jurisdictional Statement, 27-28):

> "The contention of the Union that the Court had no jurisdiction of the matter and that all such questions as are here in dispute have been preempted, supplanted and covered in the Anti-Injunction Acts, 47 U.S. Stat. at Large 70, 29 U.S.C.A. 101 to 115, and the National Labor Relations Act, 29 U.S.C.A. 151 to 161 inclusive, has been decided by this Court adversely in *State* v. *Casselman*, 69 Idaho 237, 205 P. 2d 1131; *Poffenroth* v. *Culinary Workers Union*, Local No. 328, 71 Idaho 412, 232 P. 2d 968; *Tarr* v. *Amalgamated Ass'n etc.*, 73 Idaho 223, 250 P. 2d 904. Cases from other jurisdictions holding that state courts have jurisdiction are: *Milwaukee Boston Shoe Co.* v. *American Federation of Hosiery Workers*, 59 N.W. 2d 762; *General Building Contractors Assn.* v. *Local Unions (Pa.)*, 87 A. 2d 250; *G. H. and E. Freydberg, Inc.* v. *International Ladies Garment Workers*, 128 N.Y.S. 2d 470; *Fashioncraft, Inc.* v. *Halpern et al. (Mass.)*, 48 N.E. 2d 1; *Goodwins, Inc. et al.* v. *Hagedorn et al.*, 303 N.Y. 300, 101 N.E. 2d 697; *Opera on Tour, Inc.* v. *Weber et al.*, 285 N.Y. 348, 34 N.E. 2d 349; *Roth* v. *Local Union No. 1460 (Ind.)*, 24 N.E. 2d 280; *Ostroff* v. *Laundry & Dye Works (Wash.)*, 225 P. 2d 419; *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 86 L. Ed. 1143; *United Const. Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656, 98 L. Ed. 1025. Many other cases with a similar holding could be cited."[1]

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[1] In their Motion to Dismiss appellees state:

> "The Supreme Court of Idaho did hold the state court's jurisdiction had not been supplanted by the Federal Labor Act, and cited cases in support from its Court as well as this Court." (Motion, p. 9)

Again, they say:

> "The Idaho Supreme Court found the contention of the Union that it had no jurisdiction in the matter and that all questions

II

The contention that jurisdiction over these cases is not preempted by the National Labor Relations Act, because the Idaho Supreme Court did not view them as involving a "labor dispute", might have presented a substantial issue prior to the decision of this Court in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 473, 479-480, 75 S. Ct. 480, 484, 487. But precisely that argument was made in that case, and it was rejected by the Court.

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that were in dispute had been pre-empted and supplanted and covered by the Federal Act not well taken." (Motion, p. 12)

This last statement is, however, immediately followed by the following assertion:

> "The questions the appellants seek to raise in the instant matter were not expressly passed upon by the court below for the reason the appellants never saw fit to cross-appeal from the decision of the Idaho Trial Court." (Motion, p. 12)

Elsewhere appellees say:

> "the federal questions sought to be raised were not, in either of such cases, timely or properly raised or expressly passed upon by the court below, * * *." (Motion, pp. 1-2)

And again:

> "While it is true that the appellants herein stated in their Answer that the matters in controversy were exclusively within the jurisdiction of the National Labor Relations Board, the appellants did not, after the trial court had handed down its memorandum decision and Findings of Fact and Conclusions of Law and decree were entered in each case, file a cross-appeal. Hence the only matters directly before the Supreme Court of the State of Idaho were those matters and things contained in the Assignment of Errors as set forth in the briefs prepared by the appellees here." (Motion, pp. 9-10)

III

Appellees assert that because appellants did not seek to "submit the matter to the National Labor Relations Board * * * the decision of the Idaho Supreme Court rests on an adequate non-federal basis * * *." (Motion, p. 13. See also pp. 5, 14).

However, it was the appellees who sought relief against the appellants; and since their asserted grievances fell within the statutory jurisdiction of the federal Board (Jurisdictional Statement, 15-17), it was up to appellees to show that they "had applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so." *Building Trades Council* v. *Kinard Construction Co.*, 346 U.S. 933, 74 S. Ct. 373. Appellees have never attemped to make such a showing, nor could such a showing be made. It is, to the contrary, quite clear that these cases were within the federal Board's statutory jurisdiction and that it would have exercised jurisdiction. See Jurisdictional Statement, 15-17.

* * * * * * * *

Since the filing of the Jurisdictional Statement, the National Labor Relations Board has handed down a "Decision and Determination of Dispute" in *Local 562, etc., and St. Louis County Water Co.*, 116 NLRB No. 137 (September 18, 1956). Since the facts of that case strikingly parallel those of these, the Board's decision is reprinted as Appendix A, *infra*, pp. 7-11, for the convenience of the Court.

CONCLUSION

Inasmuch as this case presents no issue of substance not squarely and recently decided by the Court, we respectfully suggest that the Court may wish to reverse the judgments

below *per curiam*, without submission of further briefs or oral argument.

Respectfully submitted,

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APPENDIX A

116 NLRB No. 137 D-65
St. Louis, Missouri

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 14-CD-59

LOCAL 562, BUILDING AND CONSTRUCTION AND METAL TRADES DIVISION, AFFILIATED WITH UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

and

ST. LOUIS COUNTY WATER COMPANY

DECISION AND DETERMINATION OF DISPUTE

On December 8, 1955, St. Louis County Water Company, herein called the Company, filed a charge with the Regional Director for the Fourteenth Region, alleging that Local 562, Building and Construction and Metal Trades Division, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, herein called the Union, had engaged and was engaged in certain unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act.

Thereafter, pursuant to Section 10 (k) of the Act and Sections 102.71 and 102.72 of the Board's Rules and Regulations, the Regional Director investigated the charge and provided for an appropriate hearing upon due notice. The hearing was held at St. Louis, Missouri, on May 24, 1956, before Harry G. Carlson, hearing officer. All parties appeared at the hearing and were accorded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] The rulings of the hearing officer made at the hearing are free from prejudicial error and are hereby affirmed. All parties were likewise afforded opportunity to argue orally before the hearing officer, and to file briefs.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

1. The Company is engaged in commerce within the meaning of the Act.

2. The Union and the Intervenor (Local 335, Utility Workers Union of America, AFL-CIO, herein called the Utility Workers) are each labor organizations within the meaning of the Act.

3. *The Dispute:* In 1955, the Company signed a contract with a general contractor for the construction of a new water purification plant (called the South County plant), which required the installation of several miles of water mains from the Meramec River to the purification plant and beyond to a final discharge point. The Company planned to install these water mains with its own employees, represented by the Utility Workers, and the construction contract for the purification plant accordingly excluded this operation.

At an all-party conference on November 16, 1955, Union Representative Seaton advised the Company, the general

[1] At the hearing the parties stipulated to incorporate the record of a related hearing in Case No. 14-CC-92, held before Trial Examiner Lee J. Best on April 16 and 17, 1956.

contractor, and the various subcontractors on the project (including a plumbing and piping subcontractor who was under agreement with the Union and employed union members) that the water main installation was work which historically and "rightfully" belonged to the Union. He demanded that such work be done by members of the Union or else the Union would have nothing to do with any of the other piping work at the project. The Company refused to yield to the Union's demand, and proceeded to lay the water mains with its own employees.[2]

The Union thereupon established three picket lines at and near the project on December 7, 1955. The picket lines continued until January 5, 1956, when they were withdrawn as a result of a District Court stipulation. The picketing caused a cessation of all operations by the general contractor and his subcontractors. The Union admits that it was responsible for the pickets and the resultant strike by employees of the general contractor and the subcontractors. The Union further admits that the purpose of the picket lines was because "other people were doing our work" and "maintenance workers [of the Company] was installing new construction."

Contentions of the Parties

The Company contends that by the above conduct the Union violated Section 8 (b) (4) (D) of the Act. The Union neither filed a brief nor made oral argument on the record, and its defense, if any, therefore does not appear.

Applicability of the Statute

In the present proceeding under Section 10 (k) of the Act, the Board is required to find that there is reasonable cause to believe that Sections 8 (b) (4) (D) has been vio-

[2] The Company based its position in part upon its contract with the Utility Workers, the certified representative of its production and maintenance employees, which provided that none of the Company's work should be contracted out if its complement of employees was qualified to do the work.

lated before proceeding with a determination of the dispute out of which the alleged unfair labor practice has arisen.

As set forth above, it is clear that the Union, by means of the picket lines and the ensuing strike, engaged in and induced employees to engage in a strike, with an object of forcing the Company to assign the disputed work to the Union's own members rather than by doing the work with Company employees, represented by the Utility Workers. We are satisfied, and find, that there is reasonable cause to believe that the Union thereby violated Section 8 (b) (4) (D). We further find that the dispute involved in this proceeding is properly before us for determination under Section 10 (k) of the Act.

Merits of the Dispute

When the Union demanded that the Company assign the work of installing the water mains to its own members, employees of the Company who were not members of the Union were performing that work. The dispute therefore was one over the Company's assignment of work to its own employees rather than to a contractor or subcontractor employing workmen belonging to the Union. It is well established that an employer is entitled to make such assignments of work to his own employees free of strike pressure by a labor organization, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.[3] The Union has no such order or certification here.

The Board finds, accordingly, that the Union was not lawfully entitled to require the Company to assign the work of installing the water mains in connection with its new South County plant to members of the Union rather than to employees of the Company, represented by the Utility Workers.

DETERMINATION OF THE DISPUTE

Upon the basis of the foregoing findings and the entire record in this case, the Board makes the following determi-

[3] *International Longshoremen's and Warehousemen's Union (Juneau Spruce Corporation)*, 82 NLRB 650.

nation of dispute pursuant to Section 10 (k) of the Act:

1. Local 562, Building and Construction and Metal Trades Division, affiliated with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and its agents are not and have not been lawfully entitled to force or require St. Louis County Water Company to assign the work in dispute to members of the Union rather than to the Company's own employees.

2. The aforesaid Union shall, within ten (10) days from the date of this Decision and Determination, notify the Regional Director for the Fourteenth Region, in writing, whether or not it accepts the Board's determination of this dispute, and whether or not it will refrain from forcing or requiring St. Louis County Water Company, by means proscribed in Section 8 (b) (4) (D) of the Act, to assign the work in dispute to members of the Union rather than to employees of the Company.

Dated, Washington, D. C.

BOYD LEEDOM, Member
PHILIP RAY RODGERS, Member
STEPHEN S. BEAN, Member
(SEAL) NATIONAL LABOR
RELATIONS BOARD

No. 372. POCATELLO BUILDING & CONSTRUCTION TRADES COUNCIL ET AL. *v.* C. H. ELLE CONSTRUCTION CO. ET AL. Appeal from the Supreme Court of Idaho. *Per Curiam:* The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted. The judgment of the Supreme Court of Idaho is reversed. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. *J. Albert Woll, Thomas E. Harris* and *Clarence M. Beck* for appellants. *L. E. Haight* for appellees. Reported below: 77 Idaho 514, 297 P. 2d 519.